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Second report on the expulsion of aliens

By Mr. Maurice Kamto, Special Rapporteur

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Introduction

1. It is appropriate to begin this second report with a brief review of the history of the topic, as the Special Rapporteur did not honour that tradition in his preliminary report. A concise overview of the main ideas put forward in the preliminary report and an update on recent developments relating to the topic will follow, before the general presentation of this report.

A. Review of the history of the topic

2. At its fiftieth session, in 1998, the International Law Commission took note of the report of the Planning Group, which identified, inter alia, the topic of the expulsion of aliens for inclusion in the long-term programme of work of the Commission.[1]

3. At its fifty-second session, in 2000, the Commission included the topic entitled "Expulsion of aliens" in its long-term programme of work,[2] and a preliminary general scheme or syllabus on the topic was annexed to the report of the Commission.[3] The General Assembly took note of the topic's inclusion in paragraph 8 of its resolution 55/152 of 12 December 2000.

4. During its fifty-sixth session, the Commission decided at its 2830th meeting, held on 6 August 2004, to include the topic "Expulsion of aliens" in its current programme of work and appointed Mr. Maurice Kamto as Special Rapporteur for the topic.[4] The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed that decision of the Commission.

5. At the fifty-seventh session of the Commission, in 2005, the Special Rapporteur introduced his preliminary report,[5] which the Commission considered at its 2849th to 2852nd meetings from 11 to 25 July 2005.[6]

B. Consideration of the preliminary report

6. In his preliminary report, the Special Rapporteur outlined his understanding of the subject and sought the opinion of the Commission on a few methodological issues to guide his future work.

1. Consideration by the International Law Commission

7. The International Law Commission endorsed most of the Special Rapporteur's choices and his draft workplan annexed to the preliminary report. However, it was suggested that the workplan should include a specific examination of the principles applicable to the expulsion of aliens. It was proposed, in particular, that the study should take into account the provisions of international human rights law requiring

[1] See *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 554.
[2] Ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729.
[3] Ibid., annex, pp. 317-320.
[4] Ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 164.
[5] A/CN.4/554.
[6] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 244.

decision on expulsion to be taken in accordance with law, with regard both to rules of procedure and to the conditions for expulsion, the application of the principle of non-discrimination, balancing a State's interest in expelling with the individual's right to privacy and family life, and the question of the risk that an individual's rights might be infringed in the State of destination.

8. As the Special Rapporteur explained, these principles, which are at the heart of the problem of the expulsion of aliens in international law, had, of course, not been overlooked, but it had not seemed appropriate to him to examine them within the framework of a preliminary report. However, part 1, chapter II of his draft workplan, devoted to general principles very clearly showed that all of the relevant principles in this area would be reviewed in detail in subsequent reports.

9. Some members of the Commission were of the view that there was no need to include in the topic the questions of refusal of admission and immigration, movements of population, situations of decolonization and self-determination or the position of the occupied territories in the Middle East. Nevertheless, the Commission agreed with the Special Rapporteur that the draft articles to be developed on the topic must present as exhaustive a legal regime as possible, founded on fundamental principles forming the legal basis for the expulsion of aliens under international law.

2. Consideration by the Sixth Committee of the General Assembly

10. The representatives of several States made statements during the consideration of chapter VIII (Expulsion of aliens) of the report of the International Law Commission[5] by the Sixth Committee during the sixtieth session of the General Assembly. Speakers generally emphasized the importance, interest and urgency of the topic, but also its complexity and difficulty.[7] On the whole, like the Commission itself, they clearly supported the general approach to the topic proposed by the Special Rapporteur.[8]

11. During the debate a number of suggestions were made. With respect to approach, it was considered that codification of the topic required, as the Special Rapporteur himself had stated, a thorough comparative study of national laws, particularly if the question of the grounds for expulsion were to be considered,[9] the relevant rules of international law and international and regional jurisprudence.[10] In that regard, it was suggested that the work done over the past four years under the Berne Initiative and by the International Organization for Migration and the Global Commission on International Migration, which had presented its report to the

[5] See report of the International Law Commission on the work of its fifty-seventh session (2005); topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat (A/CN.4/560, paras. 128-152).

[6] See especially the statements by Mr. Alan Kessel (Canada) of 25 October 2005 (A/C.6/60/SR.12, paras. 111-112); Mr. Liu Zhenmin (China) of 24 October 2005 (A/C.6/60/SR.11, paras. 50-54); and Mr. Remigiusz Henczel (Poland) of 26 October 2005 (A/C.6/60/SR.13, paras. 56-64).

[7] See the statements by Ambassador Ferdinand Trauttmansdorff (Austria) of 24 October 2005 (A/C.6/60/SR.11, para. 66) and Mr. Hiroshi Tajima (Japan) of 25 October 2005 (A/C.6/60/SR.12, paras. 5-9).

[8] See the above-cited statement by the representative of China and the statements by Ms. Victoria Gavrilescu (Romania) of 25 October 2005 (A/C.6/60/SR.12, paras. 75-78) and by Mr. Gerard van Bohemen (New Zealand) of 25 October 2005 (A/C.6/60/SR.12, paras. 109-112).

Secretary-General of the United Nations on 5 October 2005,[11] should be taken into consideration.

12. With respect to content, the suggestions were more varied and at times contradictory, especially concerning the scope of the topic. While some representatives maintained on principle that all issues relating to immigration or border control policy (non-admission and refoulement) should be excluded from the scope of the topic,[12] others considered on the contrary that refusal of entry to an immigrant on board a ship or aircraft under the control of the expelling State should be considered to fall within the framework of expulsion.[13] It was also suggested that questions relating to international humanitarian law[14] should not be included in the topic, such as the expulsion of nationals of enemy States in the event of armed conflict or the large-scale expulsion of a population as a result of a territorial dispute.[15] Moreover, attention was drawn to the need to consider the question of the return of the expelled person to the State of origin, including the return of stateless persons who had been deprived of their nationality before obtaining a new nationality.[16] In that connection, it was suggested that the decision of a Government to expel aliens should not give rise to any obligation on the part of other States to receive them. Similarly, the question of States transited by the expelled person was raised, and it was suggested that these States should also not have the obligation to readmit expelled aliens into their territory.

13. One delegation expressed strong doubts that the topic deserved autonomous treatment in terms of existing conventional and customary international law, or that expulsion could be qualified as a "unilateral act of a State". The same delegation considered that the reference to diplomatic protection was out of place in the context of the topic, since diplomatic protection was exercised only where there was a breach of international law by a State and only after the exhaustion of local remedies.[17]

14. The questions and doubts raised in those statements will be answered or resolved in this report and subsequent reports of the Special Rapporteur. Suffice it to say at this stage that, in the first place, if, as was recognized in the statement just cited, there exist rules of customary law on the matter, then the topic lends itself to codification without there being any need to demonstrate its autonomy with respect to related matters already governed by international agreements; in the second place, the reference to diplomatic protection is not intended to reopen that topic, the consideration of which has been virtually completed by the International Law Commission, which has adopted a set of draft articles on it. But to rule out diplomatic protection on principle would be to presume that expulsion could never be carried out in violation of international law, which seems unlikely. The Special

[11] See the above-cited statement by the representative of Canada.

[12] See in particular the above-cited statement by the representative of Romania, the statement by Ambassador Carl Henrik Ehrenkrona (Sweden) on behalf of the Nordic countries of 26 October 2005 (A/C.6/60/SR.13, paras. 21-23) and the statement by Mr. Park Hee-kwon (Republic of Korea) of 24 October 2005 (A/C.6/60/SR.11, paras. 86-91).

[13] See the above-cited statement by the representative of China and the statement by Mr. Park Hee-kwon (Republic of Ko[illegible]) of 24 October 2005; for an opposing view, see the above-cited statement by the representative of the Nordic countries.

[14] See the statement by Mr. Mohamed Bennouna (Morocco) of 24 October 2005.

[15] See the above-cited statement by the representative of China.

[16] See the above-cited statement by the representative of Canada.

[17] See the statement by Mr. Luis Serradas Tavares (Portugal) of 25 October 2005 (A/C.6/60/SR.12, paras. 29-39).

Rapporteur remains convinced that a State's responsibility may be engaged owing to the conditions of expulsion of an alien from its territory. Arbitral decisions in the late nineteenth and early twentieth centuries[18] sufficiently demonstrate this point; the *Diallo* case (*Guinea v. Democratic Republic of the Congo*) pending before the International Court of Justice also provides guidance along the same lines, subject to what the Court ultimately decides in this case. Nevertheless, the Special Rapporteur does not intend to develop a special responsibility regime for the matter; he intends to refer to the relevant rules governing the responsibility of States for internationally wrongful acts.

C. Recent developments relating to the topic

15. Under this heading, the Special Rapporteur does not intend to cover all the developments in recent years, or even since his preliminary report, on the question of the expulsion of aliens. He proposes, more modestly, to present the main trends in State practice in the matter since the publication of the preliminary report as well as the current thinking on the subject within the United Nations and in other international forums. The latest jurisprudence and legal writings will be referred to in due course in relation to the particular question under discussion in order to avoid the risk of repetition which would result from introducing them both at this stage and then again later to shed light on one aspect of the topic or another.

1. Recent practice of some States

16. The question of expulsion of aliens is complicated further by the dramatic and complex problem of combating terrorism and the no less alarming problem of rampant irregular immigration.

(a) Combating terrorism and expulsion

17. The phenomenon of expulsion of aliens, even considered *stricto sensu* as excluding the question of non-admission and refoulement, has continued to grow, as the requirements of combating terrorism have increased distrust towards aliens on the part of many States. In this respect, some countries have begun to amend their legislation to place greater restrictions on the conditions for entry and stay in their territory. In articles in the *Guardian* of 12 August 2005, the British Lord Chancellor, Lord Falconer, was reported as saying that "things changed" after the London attacks of 7 and 21 July 2005 and that there was a need for a text laying out for judges the "correct interpretation of the European Convention [for the Protection of Human Rights and Fundamental Freedoms]." He added: "I want a law which says that the Home Secretary, supervised by the courts, has got to balance the rights of the individual deportee against the risk to national security."[19] That was the rationale that led the British authorities to expel nine Algerian nationals suspected of being involved in terrorist activities. Home Secretary Charles Clarke said in that connection: "In accordance with my powers to deport individuals whose presence in the United Kingdom is not conducive to the public good for reasons of national

[18] A number of these arbitral decisions are cited by Charles de Boeck in "L'expulsion et les difficultés internationales qu'en soulève la pratique", *Recueil des Cours (Collected Courses of The Hague Academy of International Law)*, vol. 18 (1927-III), pp. 447-646, especially 486-494.

[19] See *The Guardian*, Friday, 12 August 2005: http://www.guardian.co.uk/guardianpolitics/story/0,,1547492,00.html and http://www.guardian.co.uk/terrorism/story/0,,1547849,00.html.

security, the Immigration Service has today detained [illegible] foreign nationals who I believe pose a threat to national security."[20]

18. Acting on the same rationale, France established regional centres to combat Islamic fundamentalism, which resulted in the expulsion of former Algerian imams, including Chellali Benchellali, Abdelkader Bouziane and Abdel Aissaoui, for their radical preaching. The French Prime Minister said that he was "convinced that the denunciation of the Islamist preachers calling for violence, the dismantling of fundamentalist networks and the expulsion of foreign nationals who do not respect our values and our laws constitute the starting point for effective counter-terrorism efforts".[21] The French Minister of the Interior on 29 July 2005 announced the expulsion, by the end of August, of some 10 Islamists to their country of origin as an action against "radical preachers who may influence the very young or very susceptible".[22] That the persons concerned were deprived of their French nationality, acquired through naturalization, to make it possible to expel them is legally significant, because it is unusual in French practice. The Minister of the Interior said in this connection: "For those who have French nationality, I would like to revive the procedures for deprivation of citizenship. It is not actually something new, it is a provision that exists in our Penal Code and has simply not been used."[22] Besides article 25 of the Penal Code thus cited, article 26 of Ordinance No. 45-2658 of 2 November 1945, as amended by the French Parliament in June and July 2004,[23] and Act No. 2003-1119 of 26 November 2003 on immigration control, stay of aliens in France and nationality allow for expulsion on the grounds of incitement to discrimination, hatred or violence directed against a person or group, against women, for example.

19. France is not the only European country to have a legal arsenal aimed at facilitating the expulsion of radical imams. In the United Kingdom, since April 2003, the Government has had the option of depriving any person of citizenship constituting a threat to the country, as it did with the Muslim cleric Abu Hamza al-Masri after he called for a jihad. Austria has also tightened its legislation; among the new measures in effect since 1 January 2006 is a provision for the expulsion of preachers whose speech is a danger to public safety. In Germany, a law that entered into force at the beginning of 2005 is also intended to facilitate the expulsion of "spiritual instigators of disorder".[24]

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[20] See *El Watan* (Algerian daily), 24 August 2005: http://www.elwatan.com/2005/08/13/2005-08-13-24508.

[21] Statement by Prime Minister Dominique de Villepin cited by Colette Thomas in her article "Paris et Londres cooperent dans la lutte contre le terrorisme", published on 25 July 2005 on the Radio France International (RFI) website: http://www.rfi.fr/actufr/articles/067/article37700.asp.

[22] Interview with the Minister of the Interior, Nicolas Sarkozy, in the French daily *Le Parisien* on Friday, 29 July 2005.

[23] On 15 July 2004 the French Senate adopted without amendments on first reading the bill adopted by the National Assembly on first reading during the twelfth legislative term (Assemblée nationale (12e législ.) : 1654, 1670 et T.A. 309; Sénat: 360 et 403 (2003-2004), http://ameli.senat.fr/publication_pl/2003-2004/360.html).

[24] For these examples, see the article by Myriam Berber, "Expulsions et déchéance de nationalité pour les imams radicaux", published on 29 July 2005, on the RFI website: http://www.rfi.fr/actufr/articles/067/article_37791.asp. Spain and Italy, for their part, while clearly threatened by radical groups, do not have any specific regulations. Other European States, in particular the Nordic countries, have chosen for the moment, for the sake of freedom of expression, not to take special measures, preferring to resolve problems on a case-by-case basis.

(b) Irregular immigration and expulsion

20. Faced with an influx of poor immigrants, the developed countries are transforming themselves into impenetrable fortresses. Increasingly, they are closing their gates to certain categories of aliens by tightening control over immigration and making the conditions for entry or stay in their territories more stringent.[25] Addressing a meeting of Prefects on 9 September 2005, the French Minister of the Interior and Regional Development defined his policy in terms of quantitative goals and demanded results from the members of his audience: "When we last met, I gave you numerical goals, asking you to remove a minimum of 23,000 aliens with irregular status this year. I note that by the end of August, 12,849 aliens had been effectively removed: in other words, 56 per cent of our goal was achieved in eight months. Therefore you have five months in which to step up your efforts. I also see that there are disparities in the results between some prefectures and others. Now, I expect everyone to mobilize their efforts, and I invite those prefects whose results are below average to apply to the National Centre for Leadership and Resources for operational support."[26] As he saw it, nothing should stop the prefects in the fulfilment of their mission. "And you must not hesitate to use all the room for manoeuvre authorized by the law. It is there for a purpose. You should therefore use the powers vested in you by the Code of Entry and Residence of Aliens, whatever petitions are made locally. I would ask you to show that you can resist pressure from this or that 'group' or 'association'; they represent no one but themselves."[26] Nothing was to stand in the way of action; neither the concerns of these officials about the reception of asylum-seekers, nor any other considerations based on the case law of the European Court of Human Rights concerning the universal right to lead a family life in the place of one's choice. "To facilitate removal, I have decided to accelerate the programme of administrative custody" he explained. "At the same time, at my request, the Minister for Foreign Affairs has instituted a procedure whereby we can sanction countries that are not cooperative in the matter of issuing travel documents by limiting the number of short-term visas France allows to their nationals. This concerns about a dozen countries, which you have identified, including Serbia and Montenegro, Guinea, Sudan, Cameroon, Pakistan, Georgia, Belarus and Egypt."[26]

21. One might question the legality of such diplomatic reprisals against what then became known as the "illegal immigration countries", as contrasted with "safe countries".[27] It really does look, however, as though here the end was being used to

[25] While recognizing that Europe "also needs immigration" and that it "is not a luxury because immigration contributes decisively to economic growth in Europe" (Romano Prodi, then President of the European Commission, on 15 October 2003, at a pre-European Council press conference), European leaders are unanimous in their "commitment to the fight against illegal immigration" in a more effective way. Among the measures envisaged or already implemented are the setting of quotas, visa policy, biometric means of identification, the establishment of an agency for border controls (proposed by the European Commission on 11 November 2003), the establishment of a European border police force or a European corps of border guards (see Communication from the Commission on the topic (COM (2002) 233)). On all these points, see *Justice & Security*, www.euroactiv.com, 13 December 2005.

[26] The text of this speech is annexed by Alain Gresh to his article entitled: "M. Sarkozy contre l'anti-France", *Le Monde diplomatique*, 26 September 2005, electronic version: www.monde-diplomatique.fr.

[27] See Alain Morice, "L'Europe enterre le droit d'asile", *Le Monde diplomatique*, www.monde-diplomatique.fr, March 2004, p. 15.

justify any means. The Minister was not at any pains to hide his determination to achieve his ultimate goal. He concluded his speech in unambiguous terms, mingling exaltation with threats: "You need to become involved personally, resolutely and consistently, if you are to achieve results. This is what you are here for, and this is what justifies your existence, because it is on this that you will be judged in the end. Our joint success, and the standard of living of the French are at stake."[29] However, the effectiveness of such policies is doubtful. We have moved on from the "myth of zero immigration"[30] to the illusion of "selective immigration",[31] while ignoring the root causes of undeclared immigration, namely, the economic imbalance in the world and the extreme poverty of the countries of origin of the illegal immigrants. Certainly, in Mr. Sarkozy's explanatory statement given to the National Assembly on 30 April 2003 on the bill finally passed by both chambers of the French parliament in 2006, he criticizes "the zero immigration dogma" which would, he said, "be harmful" to France. His bill, which proposes thorough and far-reaching amendments to the law regarding expulsion and the related penalty of being barred from French territory, which could be imposed on aliens for a certain number of offences, "maintains the possibility of issuing an expulsion order or imposing the penalty of being barred from French territory against aliens who do not have personal or family ties with France" and provides for what he calls a mechanism "for deferred expulsion", the equivalent of a solemn warning procedure.[32]

22. In Belgium, under the law of 15 December 1980 on entry into the territory, residence, settlement and removal of aliens, amended several times in pursuit of the goal of "halting immigration", a policy adopted by the Government in 1974 and still in force, 14,110 people were expelled or repatriated in 2003, of whom 7,742 were expelled by air after having spent in some cases only a few weeks but in many cases several years in Belgium. During that same year, 3,339 others were "turned back (*refoulés*)" without having crossed the Belgian frontier.[33] On 17 February 2005 the Netherlands parliament approved by a large majority the decision to expel 26,000 foreigners whose status was irregular, the so-called "undocumented" aliens.[34] With regard to the Spanish enclave of Ceuta, in Morocco, whose streets swarm with hundreds of asylum-seekers, the president of the Spanish Refugee Aid Commission expressed his dismay: "It is painful to say so, but today Spain is a country hostile to refugees because of government policy ... The democratic Spain of 2003 has forgotten the blood-soaked Spain of 1939, when hundreds of thousands of its children fled Franco's repressive regime and scattered around the globe."[35]

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[29] Speech by Mr. Sarkozy, cited above.

[30] This was the goal announced by Mr. Charles Pasqua, Minister of State and Minister of the Interior and Regional Development of France, back on 2 June 1993 (see his "*Le Monde*" interview of 2 June 1993), which gave birth to the so-called "Pasqua Law" adopted by the French parliament on 15 December 1993 and promulgated on 30 December 1993; on this topic see also François Julien-La Ferrière, "Le mythe de l'immigration zéro", *Actualité juridique — Droit administratif* (A.J.D.A.), 20 February 1994, pp. 83-95.

[31] This is the conceptual shorthand of Mr. Nicolas Sarkozy, also Minister of State and Minister of the Interior and Regional Development of France.

[32] See the bill adopted by the National Assembly and considered by the Senate under reference No. 362 dated 17 May 2006.

[33] See Francisco Padilla, «La politique belge en matière d'expulsion des étrangers», Universal Embassy: http://www.universal-embassy.be/article.php3?id_article=141.

[34] Quoted by Alain Morice in "L'Europe enterre le droit d'asile", *Le Monde diplomatique*, www.monde-diplomatique.fr, March 2004, p. 14.

23. On the topic of expulsion, the developing harmonization of European migration policy laid down in the 1999 Treaty of Amsterdam was embodied on 9 March 2005 in the first specific step taken to establish a common policy for compulsory return, initially raised during the Council of Ministers of the European Union meeting on 22 and 23 January 2005 in Dublin: the first Community charter-flight was organized jointly by Belgium, the Netherlands and Luxembourg, to fly to Priština and Tirana.[34] This policy was extended progressively in spite of opposition from the European Parliament as expressed in a motion dated 1 April 2004. In fact, during a meeting of a group of ministers of the interior of five European countries (G5) held on 5 July 2005 in Evian, in France, they announced the organization of "joint expulsions" of illegal immigrants by five European countries — France, Germany, Italy, Spain and the United Kingdom — to their countries of origin. The individuals concerned were sent on a "pooled flight". An operation of this kind, which had been done in the past, for instance by Italy and Germany, was repeated at the end of July 2005 with a "Franco-British pooled flight", to remove "some 40" immigrants who had entered France and the United Kingdom illegally.[35] This type of operation entails the risk of acting hastily or making an unfortunate error, since the expelling States might be sending illegal immigrants back to their country of origin without making sure that their lives are not threatened or that they are not going to be subjected to torture or inhuman, cruel and degrading treatment. Apart from these considerations, in such case the issue arises of whether or not these are collective expulsions. Moreover, the practice seems to be leading to an increasingly worrisome situation in which refugees may be treated like any other migrants, a situation which is a real threat to the very institution of asylum.

24. The European countries' desire to stem migration in general and to combat clandestine immigration by every possible means has in effect given rise to two new legal phenomena: "readmission agreements" and "transit agreements".

25. A readmission agreement is a bilateral agreement establishing the legal framework and the conditions for "removal" of illegal immigrants from the country where they are staying. It is a treaty concluded between the State "receiving" the illegal immigrants and the State of origin, or presumed State of origin, of such immigrants, under which the latter State agrees to accept the immigrants concerned, who have been identified and transferred under the responsibility and at the expense of the expelling State. This practice is becoming increasingly common; a country like Spain has signed such agreements with several States and is in the process of concluding as many more as possible. Some readmission agreements concluded by Spain contain provisions under which a sum of money is paid to those who are repatriated, in order to facilitate their reintegration into the country of destination.[36]

26. The "transit agreement" has a different purpose, and is far more questionable from a substantive standpoint, as can be seen from the one concluded on 8 January 2003 between Switzerland and Senegal. Under the terms of this "transit agreement", Senegal undertakes to receive and redirect all Africans that Switzerland may expel

[34] Ibid. In order to implement this policy, the European Commission decided to offer financial support of 30 million euros.

[35] See Karine G. Barzegar, «Paris et Londres expulsent 'cette semaine' une 'quarantaine' de clandestins afghans par 'vol groupé'», *Nouvel Observateur*, http://archquo.nouvelobs.com/cgi/articles?ad=societe/20050726.FAP1755.html&host=http://permane,25 August 2005.

[36] Diplomatic source.

or bar from its territory, and as the receiving country, to identify their State of origin. In this respect, article 15 of the agreement refers laconically to "special services", for which the cost will be "settled by agreement between the parties".[27] This legal peculiarity dubbed a "transit agreement" would thus open the door to sordid financial dealings between Governments over the persons of illegal immigrants in disregard of basic respect for human dignity and the plight of the individuals concerned. The conclusion of the agreement collapsed in the face of public outcry in Senegal and the efforts of Swiss human rights activists.

2. International migration: report of the Global Commission on International Migration

27. The phenomenon of migration has assumed unprecedented proportions, to which globalization has undoubtedly contributed. The complexity of the problem, together with its economic impact and political sensitivity, have made it a subject of concern for the international community. Accordingly the General Assembly decided, in its resolution 58/208 of 23 December 2003, to devote a high-level dialogue to international migration at its sixty-first session in 2006. The General Assembly also requested the Secretary-General to report to it at its sixtieth session on the organizational details of the high-level dialogue, and recalled the request in its resolution 59/241 of 22 December 2004. In his report on the matter to the sixtieth session of the General Assembly, the Secretary-General suggested the organizational arrangements for the high-level dialogue and the dates, 14 and 15 September 2006.[37]

28. By December 2003, a core group of States, encouraged by the Secretary-General of the United Nations, had set up the Global Commission on International Migration (GCIM), an independent body[38] whose aim is to create a framework for formulating a coherent and comprehensive response to international migration. In October 2005, GCIM produced an in-depth study in the form of a report entitled "Migration in an interconnected world: New directions for action".[39] Although GCIM is mainly concerned with studying the link between migration and economic development, in particular the impact of migration on development in migrants' countries of origin and destination alike, the International Law Commission, when it considers the agenda item "Expulsion of aliens", should not overlook the work done by this group of high-level experts. Apparently GCIM has also given thought to the challenge of irregular migration[40] and the human rights rules applicable to these so-called illegal migrants.[41]

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[37] See A/60/205.

[38] In August 2005, the Global Commission on International Migration (GCIM), an informal consultative body with its secretariat in Geneva, comprised over 30 States from every region of the world, including Algeria, Austria, Bangladesh, Belgium, Brazil, Canada, Egypt, Finland, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Japan, Mexico, Morocco, the Netherlands, Nigeria, Norway, Pakistan, Peru, Philippines, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey and the United Kingdom, as well as the European Union and the Holy See.

[39] Report of the Global Commission on International Migration, October 2005, available at the following website: www.gcim.org.

[40] See the report of the Global Commission on International Migration, "Migration in an interconnected world: New directions for action", pp. 32-41.

[41] Ibid., pp. 52-64.

29. According to the GCIM report, there is a broad consensus that both the number of migrants and the proportion of irregular migrants have increased. The Organization for Economic Cooperation and Development (OECD) estimates that migrants with irregular status account for from 10 to 15 per cent of the 56 million migrants in Europe, where about 500,000 new undocumented migrants arrive every year. In the United States, the number of irregular migrants (of whom half are of Mexican origin) is more than 10 million, and is growing by about 500,000 per year. Irregular migration is by no means confined to developed countries. Asia is the continent with the largest number of migrants with irregular status. It is estimated that there are 20 million in India alone, for example. They also make up the majority of migrants in Latin America and Africa,[42] where the close similarities of population groups living on either side of frontiers and the extremely porous nature of those frontiers make migratory movements easier. In Africa in particular, immigration is regarded as irregular only by State authorities, whereas the populations concerned see it as a natural movement among members of the same community and largely ignore international boundaries, which they regard as abstract and artificial in any case.

30. Irregular migration is one of the telling signs of the socio-economic imbalances aggravated by economic globalization and the rapid impoverishment of the underdeveloped countries. But it also reflects the misery of populations in countries where extreme poverty is compounded by the consequences of repeated conflict and political intolerance. In such circumstances, migrants are willing to sacrifice anything to escape from their conditions and environments, as was dramatically demonstrated by the sight of throngs of young Africans storming the barbed wire fences around the Spanish enclaves of Ceuta and Melilla. The number of clandestine immigrants who die every year in their attempt to cross barriers — natural ones, like the Mediterranean, or erected by States, like those on the frontiers of Spain — in order to reach Europe is estimated at 2,000. Similarly, about 400 Mexicans die every year trying to cross the border into the United States.[43]

3. Euro-African Ministerial Conference on Migration and Development (Rabat, 10 and 11 July 2006)

31. This Conference was attended by the representatives of 30 European countries, the Russian Federation, Turkey and Ukraine, 27 African countries, Mexico and 21 international organizations.

32. The Action Plan adopted at the Conference set out to tackle "irregular migratory flows" by cooperating in the fight against illegal immigration and by reinforcing the national border control capacity of countries of transit and departure. Under the heading of cooperation in the fight against illegal immigration, the Conference called for, inter alia, cooperating logistically and financially on the voluntary return of migrants in transit countries; setting up, while ensuring respect

[42] Ibid., pp. 32-33.

[43] Ibid., p. 34. See also the figures put forward by several associations that keep updated lists of victims; they have estimated at over 4,000 the number of deaths documented between mid-May 1992 and December 2003 in connection with clandestine migration towards Europe. Sources: Association des familles victimes de l'immigration clandestine (AFVIC); Jean Christophe Gay, *Les discontinuités spatiales* (Paris, Economica, 1995); Olivier Clochard and Philippe Rekacewicz, "En dix ans plus de 4,000 morts aux frontières", *Le Monde diplomatique*, www.monde-diplomatique.fr, March 2004.

for human dignity and the fundamental rights of individuals, efficient readmission systems among all countries concerned, in particular through the effective implementation of the relevant provisions of article 13 of the Cotonou Agreement and the conclusion of readmission agreements between the North, West or Central African countries concerned and also between the European Community or one of its member States and North, West or Central African countries; providing technical and logistical support for identifying the nationality of illegal migrants; facilitating the reintegration of irregular migrants who have returned to their home country; informing and sensitizing potential migrants to the risks of illegal immigration; and making available financial resources to assist countries facing emergency situations concerning illegal migration. As can be seen, the underlying but dominant concern of the Conference participants was the systematic expulsion of illegal migrants to their countries of origin. This is not made explicit, but the principle seems to be accepted, as the remaining text refers solely to setting the conditions for returning and reintegrating the persons to be expelled and getting their States of nationality to facilitate both the identification of their nationality and their readmission to their national territory.

33. In addition, the Rabat Ministerial Conference called for the national border control capacity of these countries and transit countries to be strengthened through improved training of staff employed in the relevant services and equipment used in transborder operational cooperation; it also urged cooperation aimed at providing the countries concerned with a computerized database for effectively combating irregular migration and cooperation in putting in place an early warning system, based on the European model, to allow for the immediate transmission of precursory signals warning of potential clandestine immigration or the activities of criminal smuggling organizations.

34. However, in the Rabat Declaration, entitled "Euro-African Partnership for Migration and Development", while the Ministers for Foreign Affairs of the participating States reaffirmed their commitment to "fighting against illegal migration, including readmission of illegal migrants ...", they also recommended "implementing an active policy of integration for legal migrants and combating exclusion, xenophobia and racism", while committing themselves to working in close partnership "following a comprehensive, balanced, pragmatic and operational approach, and respecting the rights and dignity of migrants and refugees ...". These are empty words, however, since for the European countries the main aim of the Rabat Conference was to lay the foundations for the mass expulsion, with international legitimacy, of illegal migrants originating in African countries. There remains very little opposition, if any, to these expulsions of aliens with irregular status since these States are exercising their unquestionable sovereign right. Being aware of the need to respect the fundamental rights and dignity of the persons concerned is really all that is required of them under international law, something the Special Rapporteur intends to pay particular attention to under this topic.

35. The contributions of the members of the International Law Commission, and later the States, to the debate on the preliminary report and the varied and, at times, contradictory suggestions they made, together with the above-mentioned developments in recent State practice with regard to the expulsion of aliens and the reflections of the Global Commission on International Migration and the Rabat Ministerial Conference, which underline the extent of the phenomenon of irregular

migration in the world and put forward ways of addressing it, all demonstrate the need to define the topic by determining its exact scope.

D. Scope of the topic

36. One of the aims of the preliminary report was to provoke discussion in the International Law Commission and in the Sixth Committee on the methodological issues and the scope of the topic. The debate in both bodies revealed agreement that certain questions should be included when addressing the topic under examination, although there were differences of opinion on other questions. However, no one held the view that the subject should not be addressed by the International Law Commission.[44]

37. There appeared to be a consensus that the topic should include persons residing in the territory of a State of which they did not have nationality, with a distinction being made between persons in a regular situation and those in an irregular situation, including those who had been residing for a long time in the expelling State. Refugees, asylum-seekers, stateless persons and migrant workers should also be included.[45]

38. On the other hand, some members of the International Law Commission and some representatives of States members of the Sixth Committee were of the view that it would be difficult to include denial of admission with regard to new illegal immigrants or those who had not yet become established in the receiving country. Others felt that the scope of the topic should exclude persons who had changed nationality following a change in the status of the territory where they were resident in the context of decolonization.

39. In the opinion of the Special Rapporteur, such cases cannot be excluded in principle. A distinction must be drawn between cases where a change of nationality leads to a (collective) transfer of populations who benefit from a new nationality because of a change in territorial status, and those in which persons accorded the said nationality are expelled. An expulsion of the latter kind should be subject to an ordinary law regime, and there is no reason to exclude it from the scope of the topic.

40. As far as the question of non-admission (or "expulsion" of illegal immigrants) is concerned, the practice of certain States and the identification as an alien of anyone who has crossed the frontier and entered the territory of the State in which he or she is present suggest prima facie that this question cannot be excluded from the scope of the topic without severely limiting it. Indeed, according to the representative of the Republic of Korea to the Sixth Committee, to do so "would not

[44] The representative of Hungary to the Sixth Committee had expressed the view at the fifty-ninth session of the General Assembly that the topic "should have been taken up by other institutions and bodies within the United Nations system, such as the United Nations High Commissioner for Refugees (UNHCR) or the Human Rights Commission". Taking note of the preliminary report of the Special Rapporteur on the subject at the sixtieth session of the General Assembly, he stated that in the view of his country it was incumbent upon the Special Rapporteur and the Commission "to take great care in determining the exact scope and content of the future study" (see the statement by Mr. Horváth (Hungary) in the Sixth Committee on 26 October 2005 (A/C.6/60/SR.13, para. 9)).

[45] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 273.

only unduly limit the scope of the Commission work, it would also leave unaddressed the interests and concerns of many illegal residents around the world".[46] The traditional notion of expulsion, however, concerns aliens whose entry or stay are lawful, whereas non-admission concerns those whose entry into or stay on its territory a State seeks to prevent; removal of an illegal immigrant who is at the border or has just crossed it is strictly speaking non-admission, not expulsion. It is by virtue of this judicious distinction that non-admission does not, in the opinion of the Special Rapporteur, fall within the scope of this topic.

41. As for the expulsion of aliens in situations of armed conflict, the Special Rapporteur found no valid reason for excluding it from the scope of the topic. In view of the methodological option chosen by the International Law Commission, namely to make full use of the existing treaty rules for the purpose of codifying this topic, the existence of specific rules on the matter under international humanitarian law should not be an obstacle to including this issue in the scope of the topic, quite the contrary. Moreover, owing to the contribution made by the award rendered on 17 December 2004 in the *Eritrea v. Ethiopia* case,[47] in which the issue of expulsion through deprivation of nationality is complicated by that of expulsion in a context of armed conflict, the traditional rules on the matter can be revisited.

E. General presentation of this report

42. The aim of this report is to examine the general rules applicable to the expulsion of aliens as they derive from customary law, treaty law, case law and State practice, and in the light of the way the question is dealt with in the legal literature. As a result of that examination, it will be possible to address some of the questions and suggestions formulated when the preliminary report was considered.

43. In this regard, the Special Rapporteur will generally follow, in greater detail, the approach outlined in the draft work plan annexed to his preliminary report and approved by the International Law Commission[48] and most of the States that expressed their views on the topic "Expulsion of aliens" in the Sixth Committee during the sixtieth session of the General Assembly, as indicated in paragraph 10 of this report. He did, however, reverse the order of "Scope" and "Definitions", placing the latter after the former, and reorganize the content of "Scope", moving much of it into the "Definitions" chapter, so that "Scope" now covers the standard categories of aliens to which expulsion applies. For the sake of precision, in this report, which examines some of the general rules on the expulsion of aliens, the questions that will lead to the formulation of draft articles on the topic's scope and the definitions of its key terms will be examined in greater depth.

[46] See the above-cited statement by Mr. Park Hee-kwon (Republic of Korea) (A/C.6/60/SR.11, para. 89).

[47] Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, *Partial Award, Civilians Claims, Ethiopia's Claim 5, between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, The Hague, 17 December 2004.

[48] See the report of the International Law Commission, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 269-272.

Part One
General Rules

44. The consideration of the preliminary report showed that the main point of debate and controversy, within both the International Law Commission and the Sixth Committee, was the scope of the topic. Hence, this report will focus first on determining the scope. Once the topic has been delimited, the next step will be to define, more precisely than in the preliminary report, the concepts relating to the topic, before undertaking an examination of the general principles of international law governing the matter.

I. Scope

45. The introduction to this report describes the scope of the topic in broad outline. The task now is to delimit it more precisely, by indicating the various categories of persons concerned. In keeping with the observations made in paragraphs 37 to 41 of the present report and consistent with the preference expressed by both the International Law Commission and the Sixth Committee for the elaboration of a legal regime as comprehensive as possible on the topic, the Special Rapporteur will proceed to address each of the following situations one by one: aliens residing lawfully in the territory of a State, aliens with irregular status, refugees, displaced persons, asylum-seekers and asylum recipients, stateless persons, former nationals of a State, persons who have become aliens through loss of nationality following the emergence of a new State, nationals of a State engaged in armed conflict with the receiving State and migrant workers.

46. Falling outside the scope of the topic are several categories of aliens for whom the conditions and procedures for expulsion are governed by special rules. This is the case in particular with aliens who are entitled to certain privileges and immunities, notably diplomats, consular authorities, members of special missions serving in a foreign country, international civil servants, members of the armed forces on official mission or members of a multinational armed force[49] who are subject to special rules (*leges speciales*) rather than the general rules applicable to the expulsion of aliens under international law.

47. Although it has been asserted that international law does not prohibit the expulsion of nationals,[50] the Special Rapporteur does not believe that international law authorizes it. On the contrary, the general principles point in the opposite direction. In the draft regulations for the expulsion of aliens submitted to the Institute of International Law during the session held in Hamburg in September 1891, Mr. Féraux-Giraud proposed the following rule on the subject:

> "A State may not, through administrative or judicial channels, expel its own nationals, regardless of their differences of religion, race or national origin. Such an act constitutes a serious violation of international law when it has the intentional result of removing to other territories individuals who have been convicted of a crime or who are simply the subject of legal proceedings."[51]

[49] See the memorandum by the Secretariat on expulsion of aliens (A/CN.4/565, para. 28-35).

[50] Ibid., para. 36 and footnotes 53 to 61.

[51] *Annuaire de l'Institut de droit international*, vol. XI, 1889-1892, pp. 278-279.

48. Generally speaking, this is a logical rule arising from the personal jurisdiction of the State, which imposes on it the responsibility of ensuring the protection of its own nationals, both within and outside its national territory.[52] The rule of non-expulsion of nationals can be considered "undisputed" and, thus, even if it is not expressed, it is implied.[53] It is for that reason that the domestic laws of some countries expressly prohibit the expulsion of nationals.[54] Such a rule, implicit in which is the right of a national to reside or remain in his or her own country,[55] or to enter that country,[56] does not allow for the expulsion by a State of its nationals. Furthermore, as a consequence of the preceding rule, the State is bound to admit its nationals who have been expelled from another country, but not the nationals of other States expelled by them or by third States; a State can only be required to admit nationals of other States if it has expressly agreed to do so, generally under an international agreement.[57] More specifically, it should be noted that some human rights treaties expressly prohibit the expulsion of a person from the territory of a State of which he or she is a national.[58]

49. In addition to the fact that practice provides very few examples of the expulsion of a person by the State of which he or she is a national, these arguments show that such cases of expulsion constitute real exceptions, which, moreover, are only possible with the express agreement of the receiving State. In any case, as a national is not and cannot simultaneously be an alien, the legal regime governing expulsion of nationals falls outside the scope of the topic of expulsion of aliens.

A. Aliens residing lawfully in the territory of the expelling State

50. An alien residing lawfully in a foreign State can be understood to mean a person who has entered a country lawfully or who has been formally admitted and resides there in conformity with the laws and/or regulations of that country governing the conditions under which aliens may be present or reside. The question of whether a distinction should be made between aliens in transit, aliens admitted on a temporary or short-term basis, long-term residents, and so forth, will not be addressed at this point. The only issue of concern for the moment is the legality of their presence in the territory of the receiving State, although the length of their stay might possibly have some implications with respect to the consequences of expulsion.

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[52] Patrick Dailler and Alain Pellet, *Droit international public (Nguyen Quoc Dihn)*, 7th ed. (Paris, Librairie générale de droit et de jurisprudence, 2002), paras. 322-327, pp. 493-501.

[53] See Charles de Boeck, *Recueil des Cours (Collected Courses of the Hague Academy of International Law)*, vol. 18, 1927-III, p. 448.

[54] See A/CN.4/565, para. 36, footnote 60.

[55] Ibid., para. 36 and footnote 56.

[56] The International Regulations on the Admission and Expulsion of Aliens proposed by the Institute of International Law and adopted by the Institute on 12 September 1892 contain an article which stipulates that, in principle, a State may not prohibit either its nationals or persons who are no longer nationals of that State but have not acquired the nationality of any other State from entering or remaining in its territory (*Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, p. 219).

[57] See Sir Robert Y. Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law, Volume I — Peace*, 9th ed. (1996), pp. 944-945.

[58] See A/CN.4/565, para. 36, footnote 55.

51. Lawful entry into the territory of the receiving State implies crossing the frontier of that State with travel documents that are recognized as valid by the State's authorities. Lawful stay means that the alien, having crossed the border legally, meets the conditions of stay, that is, the conditions for continued presence in the country concerned in accordance with its national law.

52. However, it is not always necessary for an alien to have entered the territory of the receiving State lawfully in order for his or her presence there to be lawful. In some countries, a person who has entered the territory of the receiving State illegally can subsequently have his or her situation regularized and obtain legal resident status.[59] This practice is becoming increasingly common in the main countries that receive clandestine immigrants, particularly in Europe and in the Americas, where regularization occurs either collectively or individually on a case-by-case basis, depending on the country.[60]

53. The expulsion of an alien residing lawfully in the territory of the expelling State has often been the only situation envisaged by most treaties. Several international conventions containing provisions on expulsion thus cover only that possibility.[61]

B. Aliens with irregular status

54. Some treaties distinguish between aliens who are lawfully present and those whose status is irregular, but they do not provide a definition of the term "illegal alien".[61] Some national legislation provides elements of a definition of this category of aliens, although the terms used to refer to them vary from country to country.[62]

55. An alien with irregular status can be understood to mean a person whose presence in the territory of the receiving State is in violation of the legislation of that State concerning the admission, stay or residence of aliens. First of all, an alien's status may be illegal by virtue of the conditions under which he or she entered the State. This is the case with illegal or clandestine migrants. Hence, any alien who crosses the frontier of the expelling State in violation of its rules concerning the admission of aliens will be considered to have irregular status. Second, the illegal status may be the result not of the conditions of entry but of the conditions of stay in the territory of the expelling State. In such cases, although the alien has crossed the frontier of the State legally and has therefore been lawfully admitted, he or she subsequently fails to comply with the conditions of stay

[59] See Atle Grahl-Madsen, *The Status of Refugees in International Law, vol. II: Asylum, Entry and Sojourn* (Leiden, A. W. Sijthoff, 1972), p. 348; see also A/CN.4/565, para. 44.

[60] This is the case, in particular, in Italy and Spain, where groups of illegal aliens have collectively had their status regularized in recent years; in France, where, after a wave of mass regularizations, there has been a hardening of attitudes towards aliens with irregular status, with a shift towards, at best, regularization on a case-by-case basis; and in the United States of America, where the federal Administration recently proposed mass regularization of Mexican immigrants, but still faces some opposition in Congress.

[61] See in particular: the International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, No. 14668 (art. 13); the Convention relating to the Status of Refugees, United Nations, *Treaty Series*, vol. 189, No. 2545 (art. 32); the Convention relating to the Status of Stateless Persons, United Nations, *Treaty Series*, vol. 360, No. 117 (art. 31); and the European Convention on Establishment of 1955. See also A/CN.4/565, para. 755, footnotes 1760-1763.

[62] See A/CN.4/565, para. 129, footnotes 249-258.

stipulated by the laws of the receiving State. This occurs, for example, when a lawfully admitted alien remains in the territory of the State beyond the period set by the competent authorities of that State. Third, an alien's presence in the expelling State may also be illegal for both of the aforementioned reasons, as would be the case if an alien had entered the receiving State illegally and had not subsequently had his or her status regularized, thus failing to comply with both the conditions of admission and the conditions of stay.

56. The conditions of stay for aliens comprise two aspects: the residence permit that legalizes the alien's presence in the territory of the State for a specific period, which may or may not be renewable, and the rules that must be complied with during the alien's stay, for example, rules relating to the activities in which the alien may or may not engage during his or her stay. It is a basic principle that a person who voluntarily enters and resides in the territory of a foreign State must comply with the conditions of stay or residence in that State, including acceptance of its legal institutions and rules.[63] These are conditional rules, and failure to comply with them may result in revocation or cancellation of the residence permit and may change the alien's status from legal to illegal, making him or her subject to possible expulsion.

C. Refugees

57. The term "refugee" has different meanings depending on whether it is considered from a sociological or a legal viewpoint. Its sociological meaning is long-standing, broad and somewhat loose. In this context, the term "refugee" has long been used to refer to persons who, for whatever reason, have been forced to leave their homes to find refuge elsewhere.[64] "Elsewhere" was not defined in relation to State boundaries. This use of the term "refugee" has not completely disappeared today. Certain international forums — employing journalese, whether consciously or not — use the term to refer to persons displaced within their own country and living in physical conditions comparable to those of displaced persons who have taken refuge in a foreign country. Such persons are also referred to as "internal refugees" or "internally displaced persons". They nonetheless need international assistance, and the General Assembly has on several occasions requested the Office of the United Nations High Commissioner for Refugees to extend them humanitarian assistance.[65]

58. The term "refugee" has a much more precise meaning in law, however. In this regard, it generally refers to persons forced to leave their country to find refuge in another country. As stated in the Judgment of the International Court of Justice in the *Asylum* case, "the refugee is within the territory of the State of refuge";[66] in other words, he would not have the status of refugee if he were in the territory of his State of nationality. Under the various international conventions on refugees,

[63] See E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, Banks Law Publishing Co., 1915), p. 179.

[64] See Jahn Eberhard, "Refugees", *Encyclopedia of Public International Law*, vol. 4, Rudolf Bernhardt, ed. (Amsterdam, Elsevier Science Publishers, 2000), p. 72.

[65] Ibid., p. 73.

[66] International Court of Justice, *Asylum* (*Colombia v. Peru*), Judgment of 20 November 1950, *I.C.J. Reports 1950*, p. 274.

refugees are persons who flee their State owing to persecution or well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion. According to some authors, persons who flee their country for reasons other than those mentioned above are "displaced persons"[67] and not refugees in the legal sense. The latter term also includes persons who are outside their State of nationality or residence but who are unable or, for valid reasons, unwilling to return to their country.[68]

59. Leaving aside the incidental and other circumstantial aspects of the definition of the term "refugee" contained in the Convention relating to the Status of Refugees of 28 July 1951, it is clear, under article 1, section A, paragraph 2, of the Convention, that the term "refugee" refers to any person who, as a result of particular events:

> "and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[69]

60. The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 adopted a broader definition of the concept of "refugee". The OAU Convention provides that, in addition to the persons covered by the 1951 Convention,[70] the term "refugee":

> "shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[71]

61. This broad definition of the term "refugee" has had an impact beyond Africa and constitutes a significant contribution by Africa to determining the meaning of the concept. At the beginning of the 1980s, it became clear that the international community was open to the OAU definition when the Executive Committee of the Programme of the United Nations High Commissioner for Refugees observed in 1981 that the increased number of large-scale refugee influx situations in different

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[67] See Louis B. Sohn and Thomas Buergenthal, eds., *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23 (Washington, D.C., American Society of International Law, 1992), p. 100.

[68] See the Convention relating to the Status of Refugees of 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, and its 1967 Protocol, United Nations, *Treaty Series*, vol. 606, No. 8791, Constitution of the International Refugee Organization of 15 December 1946, United Nations, *Treaty Series*, vol. 18, No. 283; see also Jahn Eberhard, "Refugees", *Encyclopedia of Public International Law*, vol. 4, Rudolf Bernhardt, ed. (Amsterdam, Elsevier Science Publishers, 2000), p. 72.

[69] See the Convention relating to the Status of Refugees, art. 1, sect. A, para. 2, and its Protocol of 31 January 1967.

[70] Definition used in art. I, para. 1, of the OAU Convention.

[71] United Nations, *Treaty Series*, vol. 1001, No. 14691, art. I, para. 2; the Convention has also been published in fascicle form by the Media Relations and Public Information Service of the Office of the United Nations High Commissioner for Refugees (Geneva).

areas of the world, especially in developing countries, had changed the composition of groups of asylum-seekers, which included not only those who were refugees within the meaning of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, but also those referred to in article I, paragraph 2, of the OAU Convention of 1969.[72]

62. Following that statement by the Office of the High Commissioner for Refugees in 1981, the States of Central America in 1984 adopted the Cartagena Declaration on Refugees, which recommended that the definition of "refugee" be extended to cover "... persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances which have seriously disturbed public order".[73]

63. Although the Organization of American States (OAS) had adopted a somewhat narrower definition in article 22, paragraph 7, of the American Convention on Human Rights of November 1969, the more extensive definition was subsequently endorsed both by the Inter-American Commission on Human Rights and by the OAS General Assembly.[74]

64. A number of differences can be found in the wording of the definition. The variations essentially relate to the question of whether all groups that flee the territory of their State of origin may be regarded as refugees, irrespective of the reasons for which they are forced to leave. It has been said that, in addition to the "core meaning" of the term "refugee", there are "grey areas" covering persons who are not afforded any protection by the Government of their State of origin. These "grey areas" are vague and imprecise and could give rise to dispute between candidates for refugee status or the international organizations assisting them and the host States, since there is a tendency to include victims of certain types of social constraints, victims of economic changes — sometimes referred to as "economic refugees" — or persons who leave their country purely for personal convenience. It is therefore of both theoretical and practical interest to elaborate a precise definition of the concept of "refugee" in international law and for the purposes of this study.

65. In the light of the above observations and on the basis of State and international organization practice,[75] it can be said that the definition of the term "refugee" in international law includes the following essential elements: (i) an individual who has crossed the frontier of his or her State of origin; (ii) the individual must have crossed the frontier because of some constraint; (iii) the reasons for that constraint must be clearly identifiable: well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, internal or international armed conflict, political violence, external aggression or occupation or foreign domination. In other words, "refugee" can be understood to mean a person who is outside his or her country of

[72] See Louis B. Sohn and Thomas Buergenthal, eds., *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23 (Washington, D.C., American Society of International Law, 1992), p. 103; and A/CN.4/565, para. 153.

[73] See Cartagena Declaration on Refugees, 22 November 1984, *Annual Report of the Inter-American Commission on Human Rights 1984-1985* (Organization of American States document OEA/Ser.L/V/II.66, doc. 10, rev. 1), pp. 190-193, para. 3.

[74] See A/CN.4/565, para. 156.

[75] Ibid., para. 157.

nationality or, if he or she is stateless, the country of his or her habitual residence, or a person who is obliged to seek refuge outside his or her country of origin owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, or owing to external aggression, occupation, foreign domination, internal or international armed conflict or events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality.

66. The term "refugee" thus defined refers both to a state and to a status. It is, first of all, a state, in that any person to whom the foregoing definition applies is considered to be a refugee, even if he or she has not been granted the legal status of refugee by the host country. Secondly, it is a status, in that the acquisition of said legal status, under circumstances and through procedures established by international conventions[76] and national legislation, allows the person in question to enjoy the legal protection afforded to refugees. On the basis of this concept of legal status, a distinction is drawn between humanitarian intervention to assist a person who is in the situation (state) of being a refugee and the legal protection and rights conferred by the legal status of refugee.

67. This distinction is important with regard to the expulsion of aliens. While a person with refugee status may be expelled from the host State only in exceptional cases and under certain specific circumstances, the expulsion of persons whose state is that of refugee and who may be seeking refugee status is subject, as we will see, to less restrictive rules. An individual seeking refugee status may be treated in some cases as an illegal or clandestine migrant, and thus an alien with irregular status, whereas an individual granted refugee status is governed by a specific legal regime, particularly in relation to expulsion.

68. It is generally agreed that the rights accruing to refugees should be accorded to all those who, prima facie, appear to be refugees under the legal system of any State party to the relevant international conventions, irrespective of the legality of their status.[77] There is, however, dispute as to the meaning of the terms "lawful presence" and "lawfully stay". Some commentators consider that a refugee's presence is not lawful until it has been recognized as such by a State party to the Convention,[78] that is, until the person acquires refugee status.

69. The situation is somewhat confused in that refugees awaiting a decision on their legal status do not clearly belong either in the category of "lawfully present" or in the category of "unlawfully present", and it is better to regard them as lawfully

[76] Under article 1, section A, of the 1951 Convention, a refugee who has dual nationality must be able to prove that he or she fears persecution in or no longer enjoys the protection of either country of nationality. Moreover, a refugee who does not avail himself or herself of the protection of a country of which he or she has nationality or who, having lost his or her nationality, has reacquired it, may no longer enjoy the protection of the Office of the United Nations High Commissioner for Refugees.

[77] See Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. II: *Asylum, Entry and Sojourn* (Leiden, A. W. Sijthoff, 1972), p. 94; see also John A. Dent, *Research Paper on the Social and Economic Rights of Non-Nationals in Europe*, commissioned by the European Council on Refugees and Exiles (ECRE), p. 15.

[78] See, for example, Matti Pellonpää, *Expulsion in International Law: A Study in International Aliens Law and Human Rights with Special Reference to Finland* (Helsinki, Suomalainen Tiedeakatemia, 1984), p. 292.

present in the physical sense but not in the sense that they could claim all the rights accorded to those with the legal status of refugee.[79]

70. Other authors argue, however, that refugees may be considered to be lawfully present once they have been admitted to the procedure for acquiring the legal status of refugee or for admission to the host State. Nonetheless, they take the view that, where the host State has not specified the mechanisms or the procedure for acquiring the legal status of refugee, the presence in that State's territory of refugees seeking such status should be considered tacitly lawful.[80]

71. Whatever the subtleties of one approach or another, it should nonetheless be noted that all of them draw a distinction between those applying for refugee status or waiting to be granted it and those who have been granted it. All agree also that the legal situation of each of the two groups is different. The controversial point is how to define the legal situation of an applicant for refugee status between the time of submission of the application and the time of receipt of a response. Some authors consider that one should speak of lawful stay subject to a time limit.[81] In fact, the answer depends on national law, and the question will be duly considered when the conditions for expulsion are analysed.

D. Displaced persons

72. A refugee is different from a displaced person. A displaced person who is by force of circumstances in a foreign territory, outside his or her State of origin or nationality, is in a situation comparable to that of a refugee. However, displaced persons cannot be assimilated to refugees, even though they generally have the same need for protection. The distinction between the two situations lies in the reasons for taking refuge in a foreign country. Displaced persons who are outside the territory of their country of origin or nationality are in that situation for reasons other than those set out in the definition of "refugee" in international law: they are outside their country because of natural or man-made disasters. The category of displaced persons essentially consists of victims of such disasters, who are commonly known as "ecological" or "environmental" refugees. It is these persons whom the General Assembly has had in mind since 1977 when referring to "refugees and displaced persons".[81]

[79] See Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. II: *Asylum, Entry and Sojourn* (Leiden, A. W. Sijthoff, 1972), p. 362.

[80] See James Hathaway, *The Rights of Refugees under International Law*, cited by John A. Dent in *Research Paper on the Social and Economic Rights of Non-Nationals in Europe*, p. 17.

[81] Some commentators understand "lawful stay" (or "legal stay") to mean presence for three months or more: see Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. II: *Asylum, Entry and Sojourn* (Leiden, A. W. Sijthoff, 1972), p. 374, footnote 65.

E. Asylum-seekers and asylum recipients

1. Concept

73. The right of asylum is today established as a rule of customary international law, although it has its origins in national law.[82] Article 14, paragraph 1, of the Universal Declaration of Human Rights of 1948 states:

> "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[83]

74. This rule is reinforced by the Declaration on Territorial Asylum, article 1, paragraph 1, of which states:

> "Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States."[84]

75. The exercise of this right is a matter of State sovereignty.

76. The institution of asylum has a longer history in international law than the concept of refugee, although the two concepts have features in common. In the resolutions of the Institute of International Law adopted at the Bath session in 1950, "the term 'asylum' refers to the protection that a State accords within its territory or in another place under the jurisdiction of certain of its organs to an individual seeking such protection".[85]

77. This definition renders the general meaning of asylum. However, the legal regime governing the right of asylum varies depending on the place where the right is exercised and on the rules applicable to the asylum recipient.

2. Types of asylum

78. There are three different types of asylum: territorial or internal asylum, extraterritorial or diplomatic asylum, and neutral asylum.

79. The first two types are linked to criteria of a geographical nature or relating to territorial competence. The third is linked to the nature of the recipients and the rules applicable to them.

80. The right of territorial asylum is understood to mean the right of a State of refuge to grant shelter or protection on its territory to a foreigner who requests it.[86]

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[82] For example, in France, the fourth paragraph of the preamble to the Constitution of 27 October 1946, which is incorporated in the preamble to the Constitution of 4 October 1958, provides that "any man persecuted in virtue of actions in favour of liberty may claim the right of asylum in the territories of the Republic".

[83] General Assembly resolution 217 A (III) of 10 December 1948.

[84] General Assembly resolution 2312 (XXII) of 14 December 1967.

[85] Institute of International Law, resolution entitled "L'asile en droit international public (à l'exclusion de l'asile neutre)", article 3, para. 1, *Annuaire de l'Institut de droit international*, Bath session, 11 September 1950, vol. 43-II, p. 376.

[86] See Charles de Visscher, *Théories et réalités en droit international public*, 4th ed. (Paris, Pedone, 1970), pp. 202-203 (*Theory and Reality in Public International Law*, trans. P. E. Corbett, revised ed. (New Jersey, Princeton University Press, 1968)); Jean Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 94.

In addition to persons facing persecution, the Declaration on Territorial Asylum states that persons "struggling against colonialism"[84] are among those who may be granted territorial asylum. However, anyone who is the subject of "prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations" pursuant to article 14, paragraph 2, of the Universal Declaration of Human Rights.[85]

81. Treaty law has helped to define the concept of territorial asylum. The Convention on Territorial Asylum, concluded at Caracas on 28 March 1954,[87] specifies the causes of persecution that may give victims a right to territorial asylum. Article II of the Convention stipulates:

> "The respect which, according to international law, is due the jurisdictional right of each State over the inhabitants in its territory, is equally due, without any restriction whatsoever, to that which it has over persons who enter it proceeding from a State in which they are persecuted for their beliefs, opinions, or political affiliations, or for acts which may be considered as political offenses.
>
> "Any violation of sovereignty that consists of acts committed by a government or its agents in another State against the life or security of an individual, carried out on the territory of another State, may not be considered attenuated because the persecution began outside its boundaries or is due to political considerations or reasons of state."

82. Similarly, article 22, paragraph 7, of the American Convention on Human Rights of 22 November 1969 (Pact of San José, Costa Rica)[88] provides:

> "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes".

83. The right of extraterritorial asylum is understood to mean the right of a State to grant individuals refuge in places that are outside its territory but are subject to its jurisdiction. Various places fall into this category. According to the Institute of International Law:

> "Asylum may be granted on the premises of diplomatic missions, consulates, warships, government vessels deployed for public services, military aircraft and places within the jurisdiction of an organ of a foreign State that is permitted to exercise authority in the territory."[89]

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[87] United Nations, *Treaty Series*, vol. 1438, No. 24378.

[88] Ibid., vol. 1144, No. 17955, p. 151.

[89] See Institute of International Law, resolution entitled "L'asile en droit international public (a l'exclusion de l'asile neutre)", *Annuaire de l'Institut de droit international*, Bath session, 11 September 1950, vol. 43-II, art. 3, p. 376.

84. The granting of extraterritorial asylum is largely dependent on political considerations. This applies in particular when extraterritorial asylum takes the form of diplomatic asylum. It is a treaty right[90] of the head of mission of the sending State to refuse to hand over to the authorities of the receiving State political figures who are nationals of the receiving State who take refuge in the mission premises and to obtain safe-conducts for such persons allowing them to leave their country.[91]

85. In the *Asylum* case, Víctor Raúl Haya de la Torre, head of the American People's Revolutionary Alliance party, who was being prosecuted along with other members of the party for the "crime of military rebellion", had sought asylum at the embassy of Colombia in Lima. The Ambassador of Colombia informed the Peruvian Minister for Foreign Affairs in a letter dated 3 January 1949 — in accordance with the second provision of article 2 of the Convention fixing the Rules to be observed for the Granting of Asylum, signed by the two countries at Havana in 1928 — that Mr. Haya de la Torre had "been given asylum at the seat of [the] mission" and stated in a further letter dated 14 January that, pursuant to instructions received from the chancellery of his country, the Government of Colombia, in accordance with the right conferred upon it by article 2 of the Convention on Political Asylum, signed by the two countries at Montevideo on 26 December 1933, had "qualified Señor Víctor Raúl Haya de la Torre as a political refugee".[92]

86. The Government of Peru disputed the legality of the asylum granted and refused to issue the safe-conduct requested by Colombia. The International Court of Justice observed that, under the second provision of article 2 of the Havana Convention, the essential justification for asylum was in the imminence or persistence of a danger for the person of the refugee, and that it was incumbent upon Colombia to submit proof of facts to show that the above-mentioned condition was fulfilled. In the Court's opinion, the asylum cases cited by Colombia were not such as to allow the Court "to assess the value of such cases as precedents tending to establish the existence of a legal obligation upon a territorial State to recognize the validity of asylum which has been granted against proceedings instituted by local judicial authorities".[93] Moreover, it emerged from those cases that, in a general way, "considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation".[93]

87. These remarks showed, in the Court's opinion, "that asylum as practised in Latin America is an institution which, to a very great extent, owes its development to extra-legal factors. The good-neighbour relations between the republics, the different political interests of the governments, have favoured the mutual recognition of asylum apart from any clearly defined juridical system".[93]

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[90] Diplomatic asylum is quite frequently granted by certain countries, particularly in Latin America, where it is a well-established institution of regional international law. See, by way of illustration, the Convention fixing the Rules to be observed for the Granting of Asylum, signed at Havana on 20 February 1928, League of Nations, *Treaty Series*, vol. CXXXII, No. 3046, p. 323; and the Convention on Diplomatic Asylum, signed at Caracas on 28 March 1954, United Nations, *Treaty Series*, vol. 1438, No. 24377.

[91] Jean Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 96.

[92] International Court of Justice, *Asylum* (*Colombia v. Peru*), Judgment of 20 November 1950, *I.C.J. Reports 1950*, p. 273.

[93] Ibid., p. 286.

88. However, the Court also noted that the parties had not disputed that "asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population".[94]

89. While some of the Court's remarks suggest that general international law does not recognize the right to diplomatic asylum as a legal institution generating rights and obligations, it is apparent that such a right may be founded on custom, not only on regional or local custom, but also on general custom. That is doubtless the sense in which the codification efforts undertaken by the Institute of International Law at its Bath session in 1950 should be understood.

> "Asylum may be granted to any individual whose life, physical integrity or freedom is threatened by violence emanating from the local authorities, or from which the local authorities are clearly unable to defend that individual, or even which they provoke or tolerate. These provisions similarly apply if the threats are the result of internal strife.
>
> "Should a Government become clearly disrupted or dominated by a faction to the point where it no longer sufficiently guarantees the individual's physical safety, diplomatic agents ... may grant or maintain asylum even against proceedings by the local authorities."[95]

90. In the case of diplomatic asylum, in contrast to territorial asylum, the refugee is within the territory of the State in which the offence was committed, and the decision to grant asylum therefore involves a derogation from its sovereignty in that it depends essentially on the State granting diplomatic asylum, which is restricted only in that it cannot make a "unilateral and definitive qualification" of the nature of the offence of which the asylum-seeker is accused binding on the State in which the offence was committed.[96] Because a decision to grant asylum withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State, the Court takes the view that: "Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."[97]

91. Neutral asylum usually applies in situations of conflict. In its September 1906 resolution on neutrality, the Institute of International Law defined it as follows: "The right to neutral asylum is the right of a neutral State to grant, within its jurisdiction, shelter to those seeking refuge from the calamities of war" (art. 5).[98]

92. Refuge may consist of shelter and temporary leave to remain in the territory or on a Government vessel of the neutral State; it may be granted to members of the armed forces of the belligerents, escaped prisoners of war, sick or wounded civilians or refugees fleeing armed conflict. Those granted neutral asylum may not continue to participate in the fighting or even retain the means to fight. Accordingly, active

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[94] Ibid., pp. 282-283.

[95] See Institute of International Law, resolution entitled "L'asile en droit international public (à l'exclusion de l'asile neutre)", article 3, paras. 2-3, *Annuaire de l'Institut de droit international*, Bath session, 11 September 1950, vol. 43-II, p. 377.

[96] See *Asylum (Colombia v. Peru), I.C.J. Reports 1950*, pp. 275 and 278.

[97] Ibid., p. 275.

[98] *Annuaire de l'Institut de droit international*, 1906, vol. 21, p. 375.

members of armed forces must be disarmed and interned, while escaped prisoners of war may be assigned to quarters if they wish to remain in the neutral State.[99]

93. Neutrality in this instance must be understood as a State's non-involvement in the conflict. In that connection, the law of armed conflict obliges the State not party to the conflict:

> "to care for the civilian wounded and sick ... and to treat them humanely, but unlike the provisions laid down with regard to the military wounded and sick, there is no obligation to keep them until hostilities have ended. The civilian wounded and sick may request repatriation, particularly through the diplomatic representation of their country. They may also seek asylum in the State in whose territory they have landed, or in another State".[100]

94. Neutral asylum does not give the recipient permanent status. It is intended to address — for a limited time and essentially for humanitarian reasons — a situation of serious crisis which places his life in danger. It therefore differs from the traditional form of asylum whose nature and significance we have already explored, particularly as the recipient of neutral asylum, as indicated above, can request asylum from the neutral State or another State.

95. Nonetheless, recipients of neutral asylum are also affected by the issue of expulsion of aliens, as the protection which they are provided and the neutral State's obligations to them show clearly that they cannot be removed from the territory of that State at just any time or in just any manner.

3. Asylum-seekers and refugees

96. The distinction between the institution of asylum and the concept of a refugee is not always clear to everyone. Laws in a number of countries use both interchangeably,[101] while laws in others use "asylum" in a broader sense than "refugee".[102] In that respect, the latter coincide with international law. The International Law Association has drawn a distinction between the two, attributing a broader meaning to "asylum" than to "refugee".[103] Its draft convention on territorial asylum defines the two terms as follows:

> Article 1, subparagraph (a): "All States have a right to grant asylum to all victims of or who have a well-grounded fear of persecution and to political offenders".
>
> Article 1, subparagraph (b): "The High Contracting Parties undertake to grant refuge in their territories to all those who are seeking asylum from persecution on grounds of race, religion, nationality, membership of a particular social group, which shall be understood to include any regional or linguistic group, or adherence to a particular opinion ... ."[104]

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[99] Jean Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 95.

[100] See Yves Sandoz, Christophe Swinarski and Bruno Zimmerman eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC/Nijhoff, 1986), p. 334.

[101] See examples in A/CN.4/565, para. 171, footnote 344.

[102] Ibid., footnote 345.

[103] International Law Association, Committee on Legal Aspects of the Problem of Asylum, Report and draft conventions on diplomatic and territorial asylum, *Conference Report* 1972, pp. 196-211.

[104] Ibid., p. 207.

97. There is no limit placed on the forms of persecution that can result in the granting of asylum, in contrast to the forms of persecution which open the way to refugee status. In recent years, for example, persecution on the basis of gender or gender-linked practices has been advanced as the basis for claims of asylum.[105]

98. Some authors, in examining their countries' domestic laws, have also underlined the need to distinguish between asylum and refugee status. Asylum is presented as a sovereign decision of a State which has the "effect of granting an alien's request to remain", while recognition of refugee status by the competent national authority "confers on the recipient particular rights going beyond the right to remain".[106] With that distinction in mind, France's Constitutional Council, deeming the right of asylum to be a fundamental right, that is, a right which in French law is "one of the essential guarantees of adherence to other rights and freedoms",[107] has affirmed that aliens may invoke a right to which the French people have solemnly declared their commitment, the right whereby "any individual persecuted in virtue of actions in favour of liberty may claim the right of asylum in the territories of the Republic".[108]

99. The situation of an asylum-seeker is similar to that of a refugee in that the return ("refoulement") of both is subject to limits which do not apply to the expulsion of an alien without either refugee or asylum-seeker status. The Convention relating to the Status of Refugees adopted in Geneva on 28 July 1951 says that the Contracting States may not "expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" (art. 31, para. 1). Usually, an alien seeking asylum is permitted to remain provisionally in the territory until his or her application has been ruled on. French judicial precedent, for example, has recognized that an asylum-seeker claiming refugee status should be allowed to remain provisionally in French territory until the French Office for the Protection of Refugees and Stateless Persons or, where applicable, the Refugee Appeals Commission, has ruled on his or her application.[109] While the French Constitutional Council considered that that principle was founded on the preamble to the French Constitution of 1946, the Council of State considered that it was founded on article 31, paragraph 2, of the

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[105] See Anne M. Trebilcock, "Sex Discrimination", *Encyclopedia of International Law*, vol. 4, Rudolf Bernhardt, ed. (Amsterdam, Elsevier Science Publishers, 2000), p. 395.

[106] Claude Norek, "Le droit d'asile en France dans la perspective communautaire", *Revue française de droit administratif*, 15 January-15 March 1989, pp. 200-206.

[107] Claude Franck, "L'évolution des méthodes de protection des droits et libertés par le Conseil constitutionnel sous la septième législature", *JurisClasseur Périodique*, 17 September 1986, Doctrine n° 3256.

[108] Constitutional Council, Decision n° 93-325 DC of 13 August 1993, *Journal Officiel*, 18 August 1993, p. 11722; see Véronique Fabre-Alibert, "Réflexion sur le nouveau régime juridique des étrangers en France", *Revue du droit public et de la science politique en France et à l'étranger*, 1994, 2, p. 1183. Because the right to asylum is considered a fundamental right in French law, there is well-established judicial precedent that legislation cannot "regulate the conditions applying to that right except with the aim of making it more substantive or reconciling it with other rules or principles of constitutional rank". (see Constitutional Council, Decision n° 84-181 DC of 10 and 11 October 1984, *Entreprises de presse* in Louis Favoreu and Loïc Philip, *Les grandes décisions du Conseil constitutionnel*, 5th edition. (Paris, Sirey, 1989), p. 609).

[109] See Council of State, Assembly of 13 December 1991, *M. Nkodia and Prefect of Hérault v. Dakoury*, *Revue française de droit administratif* (Paris, Dalloz), January-February 1992, pp. 90-103; and, in the same vein as this judicial precedent, Constitutional Council, Decision n° 93-325 DC, as cited above; preambular paragraph 84.

1951 Geneva Convention relating to the Status of Refugees and on the act of 25 July 1952 establishing the French Office for the Protection of Refugees and Stateless Persons.[110]

F. Stateless persons

100. The term "stateless person" refers, put briefly, to a person who has no nationality. In more elaborate terms, it can be considered to refer to a person who does not have the nationality of any State, or who does not have nationality by virtue of the application of the relevant national law of the State concerned. Some consider that it may also be construed to include a person who has a nationality but does not enjoy the protection of his or her Government.[111] This broader view of the meaning of the term should be treated with caution, as it could make implementation difficult in practice. At what point does one consider that a State is not protecting one of its nationals? Does the obligation entail the obligation to take measures or to produce results? Who decides whether a State is inadequately fulfilling its obligation to protect? What about the many poor countries which often fail to give their nationals appropriate protection even in situations where such protection is essential?

101. On the other hand, from a legal standpoint it is easy to conceive that a person might become stateless by reason of not acquiring a nationality at birth, usually referred to as "original nationality", or subsequently by losing or being deprived of the nationality of a State without having acquired the nationality of another State.[112] These are the typical forms of statelessness.

102. The Convention relating to the Status of Stateless Persons, concluded in New York on 28 September 1954, provides a precise definition of statelessness inspired by the resolution adopted by the Institute of International Law at its 1936 session in Brussels. The latter definition reads: "The term 'stateless person' refers to any person who is not considered by any State to hold its nationality".[113] Similarly, but with a choice of words and a precision which improve upon the Institute of International Law definition, article 1, paragraph 1, of the 1954 Convention states: "For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law."[114]

103. Some countries' laws either use the definition of the 1954 Convention or define "stateless persons" in the commonly understood sense of a person who is without nationality or known nationality.[115]

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[110] See Fabre-Alibert, "Reflexion sur le nouveau régime juridique des étrangers en France", *Revue du droit public et de la science politique en France et à l'étranger*, 1994, 2, p. 1184.

[111] Hans Von Mangoldt, "Stateless persons", *Encyclopedia of Public International Law*, vol. 4, Rudolf Bernhardt, ed. (Amsterdam, Elsevier Science Publishers, 2000), p. 656 and A/CN.565, para. 173.

[112] See Sir Robert Y. Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law, Volume I — Peace*, 9th ed. (1996), pp. 886-890.

[113] Institute of International Law, "Statut des apatrides et des réfugiés", *Annuaire de l'Institut de droit international*, 1936-II, p. 294.

[114] United Nations, *Treaty Series*, vol. 360, No. 5158.

[115] See A/CN.565, para. 175, footnotes 350-355.

104. Notwithstanding the Convention on the Reduction of Statelessness concluded in New York on 30 August 1961,[116] there are still stateless persons in a number of countries. This situation has a bearing on the topic under consideration in that the stateless person does not have the status of national of the host State while not having the nationality of any other State, either. In other words, a stateless person is an alien everywhere from the legal standpoint; for that reason, international law extends particular protection to stateless persons.

G. Former nationals

105. The term "former national" refers to a person who no longer has the nationality of the State of which he or she was previously a national. Such a situation may arise from loss of nationality or from deprivation of nationality.[117]

106. Loss of nationality results from a voluntary act undertaken by a national of a State which has the effect of ending his or her status as a national of that State. Usually, such a situation is a consequence of naturalization, whereby a person, of his or her own free will, acts to acquire voluntarily a new nationality, losing the former nationality if the laws of the State of which he or she was formerly a national or the State of which he or she has become a national prohibits dual or multiple nationality. Domestic legislation in a number of States, particularly new States, contains such clauses disallowing multiple nationality.[118]

107. Deprivation of nationality, unlike loss of nationality, is the effect of an act by the State which deprives a person of his or her nationality. Deprivation of nationality may be a penalty for failure on the part of a naturalized person to comply with the laws on nationality of the State of which he or she has become a national.[119] In such instances, deprivation is usually by administrative act. However, it can also be decreed by legislative act in particular situations, for example, when nationals become — de jure or de facto — nationals of another State following the separation of that State into two or more States.

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[116] Article 8, paragraph 1, of the Convention provides: "A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.", United Nations, *Treaty Series*, vol. 989, No. 14458, p. 179.

[117] For example, pursuant to article 2 of Act No. 68-LF-3 of 11 June 1968, establishing the Nationality Code of Cameroon, "Cameroonian nationality is acquired or lost after birth through the effect of legislation or of a Government decision taken in accordance with the conditions established by law" *Journal officiel de la République fédérale du Cameroun*, 11 June 1968, p. 150.

[118] Article 31 of the Nationality Code of Cameroon also provides:

> "The following shall lose Cameroonian nationality:
>
> (a) A Cameroonian who, having reached the age of majority, voluntarily acquires or retains a foreign nationality;
>
> (b) A person who exercises the option to repudiate his status as a Cameroonian according to the provisions of this Act;
>
> (c) A person employed in the public service of an international or foreign entity who remains in that employment despite an order to resign from it issued by the Government of Cameroon."

[119] Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27-32, between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, The Hague, 17 December 2004, para. 10.

108. Such a situation arose when Eritrea separated from Ethiopia following the April 1993 referendum on self-determination, in which the people of Eritrea opted for independence. Many people of Ethiopian nationality but Eritrean origin lived in Ethiopia, had assets there and carried on habitual activities there. Eritrea alleged that Ethiopia had "wrongfully denationalized, expelled, mistreated and deprived of property tens of thousands of Ethiopian citizens of Eritrean origin in violation of multiple international legal obligations".[119]

109. Ethiopia challenged that allegation, and its opposition gave rise to the *Eritrea v. Ethiopia* case, submitted for arbitration to a Claims Commission, which rendered a partial award in that connection on 17 December 2004.[120] The case, which we will examine in greater detail several times in the context of this topic, raises the issue of loss or deprivation of nationality in connection with succession of States, as well as the deprivation of dual nationals of one of their nationalities followed by expulsion in the event of armed conflict on the grounds that they have become nationals of an enemy State.

H. Persons who have become aliens through loss of nationality following the emergence of a new State

110. A new State may emerge through decolonization, transfer or separation of part of the territory, unification, dissolution or breaking-up of an existing State. The sovereign prerogatives of the new State, whether it is considered a successor State or otherwise, include the power to grant or refuse its nationality according to the rules of its domestic law. However, as the International Law Commission pointed out in the preamble to its draft articles on nationality of natural persons in relation to the succession of States, this must be "within the limits set by international law", and, when decisions are taken in that connection, "due account should be taken both of the legitimate interests of States and those of individuals". The major concern of individuals is in fact to possess a nationality, and the right of every individual to a nationality is emerging as a fundamental principle of international law.[121] Article 1 of the above-mentioned International Law Commission draft articles on nationality of natural persons in relation to the succession of States, adopted in 1999 on second reading,[122] recalls that principle: "Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned ...".

111. One of the main aims of the draft articles, which have the effect of introducing a "presumption of nationality", is to prevent statelessness, and they could consequently be considered "to strike a satisfactory balance between the practical needs relating to the succession of States and concerns relating to human rights and

[120] See *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27-32, between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, The Hague, 17 December 2004.

[121] As set forth in article 15 of the Universal Declaration of Human Rights and recalled in articles 4 and 18 of the European Convention on Nationality of 6 November 1997.

[122] A/54/10, para. 47; see, in connection with the draft articles, the reports of Mr. Václav Mikulka, Special Rapporteur on this topic (1995-1998) (A/CN.4/467, 474, 480 and Add.1 and 489) and Constantine Economides, "Les effets de la succession d'Etats sur la nationalité des personnes physiques", *Revue générale de droit international public*, No. 103/1999/3, pp. 577-599.

could help to stabilize what is still inconsistent practice".[123] However, the draft articles do not completely eliminate the risk of statelessness. Moreover, they by no means prevent individuals with dual nationality arising from the emergence of a new State from losing one of those nationalities, thus becoming aliens in the State whose nationality they have lost and therefore liable to expulsion. As the distribution of population between the original State and the new State formed from it is usually based on ethnicity, the original — or old — State has only to decide to deprive of their nationality those members of the ethnic group making up the population of the new State who have opted for the nationality of the new State in order for many individuals to become suddenly aliens in a State in which they may have been established for a very long time. The *Eritrea v. Ethiopia* case illustrates this theory quite well, except for the consideration that the decision to deprive Ethiopian nationals of Eritrean origin of their Ethiopian nationality was sparked by the outbreak of war between the two countries in 1998.

I. Nationals of a State engaged in armed conflict with the host State

112. It was long held, until the late nineteenth century at least, that States had the right to expel from their territories nationals of an enemy Power. This right was exercised on the basis of a distinction between friendly aliens and enemy aliens, without distinguishing among the latter between those who were participating in some way in the war effort of their country of origin or who had a hostile attitude towards the host State and those who were living there peacefully. British legal theorists took a clear-cut position on this matter, stating that:

> "Nothing could be clearer than the right of the British executive in time of war to exclude the subjects of the unfriendly power. The same is true of the entry of foreign sovereigns or ambassadors at any time as they represent the sovereignty of a foreign State, and their forcible entry at any time would constitute a *casus belli*. In either case no injury resulting to them through their exclusion from British territory by British executive officers would afford them a ground of action in an English court."[124]

113. Such a radical concept is no longer acceptable today, when the international community's sustained attention to the protection of human rights has led to the softening, even in some cases the abandonment, of certain traditional practices that are incompatible with those rights.

114. Nevertheless, it cannot be maintained that the principle or practice of expelling "enemy" aliens or nationals of a State engaged in armed conflict with the host State has disappeared. In the case of *Eritrea v. Ethiopia*, Eritrea accused Ethiopia of engaging in "ethnic cleansing" by carrying out a mass expulsion of Ethiopians of Eritrean origin, that is, expelling its own nationals in violation of international law. The Eritrea-Ethiopia Claims Commission, concurring with Ethiopia's arguments in this regard, noted that international humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict.

[123] See Patrick Dailler and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7th ed. (Paris, Librairie générale de droit et de jurisprudence, 2002), paras. 322-327, pp. 493-501.

[124] "Colonial Expulsion of Aliens", *American Law Review*, No. 33 (1899), pp. 90-91.

The Commission cited in this regard one of the authorities on international law, *Oppenheim's International Law*, which states:

> "The right of states to expel aliens is generally recognized. It matters not whether the alien is on a temporary visit or has settled down for professional, business or other purposes on its territory, having established his domicile there. On the other hand, while a state has a broad discretion in exercising its right to expel an alien, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion. Beyond this, however, customary international law provides no detailed rules regarding expulsion and everything accordingly depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of hostilities and in time of peace. A belligerent may consider it convenient to expel all hostile nationals residing, or temporarily staying, within its territory: although such a measure may be very hard on individual aliens, it is generally accepted that such expulsion is justifiable."[125]

This opinion is shared by most writers on international humanitarian law.[126]

115. The Eritrea-Ethiopia Claims Commission also held, in this context, that Ethiopia had acted lawfully in depriving a substantial number of dual nationals (Ethiopians-Eritreans) of their Ethiopian nationality following identification through Ethiopia's security committee process. It added: "Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law."[127]

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[125] Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law, Volume I — Peace*, 9th ed. (1996), para. 413, pp. 940-941; see also award of 17 December 2004 of the Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27-32, between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, The Hague, 17 December 2004, para. 81.

[126] See, for example, Karl Doehring, "Aliens, Expulsion and Deportation", *Encyclopaedia of Public International Law* (1985), vol. 8, p. 16 ("[A] State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and existence of the expelling State would otherwise be seriously endangered, for example ... during a state of war."); Gerald Draper, *The Red Cross Conventions* (1958), pp. 36-37, quoted in Marjorie Whiteman, ed., *Digest of International Law* (1968), vol. 10, p. 274 (citing "the customary right of a state to expel all enemy aliens at the outset of a conflict"); Dieter Fleck, ed., *Handbook of Humanitarian Law in Armed Conflict* (1995), para. 589 (5).

[127] See the award of 17 December 2004 of the Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27-32, between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, The Hague, 17 December 2004, para. 82.

J. Migrant workers

116. The problem of the migrant worker exists on every continent, as demonstrated by the regional seminars on the issue.[128] The phenomenon is growing continuously with the development of international transport. The resultant diversity of migrant workers means that each case requires individual attention. The lack of such attention often opens the way to the enactment in receiving countries of rules that discriminate against this category of worker.[129]

117. A "migrant worker" is a person who migrates from one country to another in order to obtain employment, rather than to work on his or her own account.[130] The term is defined along these lines in International Labour Organization (ILO) Conventions Nos. 97 and 143,[131] as "a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment".[132]

118. Similarly, article 2, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990[133] — which has yet to enter into force[134] — defines a migrant worker as: "A person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."

119. It should be noted that the expression "to be engaged" refers to the intending migrant worker who has a contract of employment. These definitions all exclude any person seeking work in a foreign country for the first time without having already concluded a contract of employment with an employer, as well as illegal migrant workers. They also exclude other categories of person, including frontier

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[128] See Baroness Elles, *International Provisions Protecting the Human Rights of Non-Citizens* (United Nations publication, Sales No. E.80.XIV.2), pp. 21-22. For a more detailed exposition on the protection of the rights of migrant workers provided in studies produced for the United Nations, see the report by Halima Warzari on the exploitation of labour through illicit and clandestine trafficking (E/CN.4/Sub.2/351); General Assembly resolution 2920 (XXVII) of 15 November 1972, the completed report by Ms. Warzari (E/CN.4/Sub.2/L.640) of 4 July 1975, which, together with the report of the seminar on the human rights of migrant workers held in Tunis from 12 to 24 November 1975 (ST/TAO/HR/50), was submitted by the Commission on Human Rights to the General Assembly at its thirty-first session (see General Assembly resolution 31/127 of 16 December 1976).

[129] See Baroness Elles, *International Provisions Protecting the Human Rights of Non-Citizens* (United Nations publication, Sales No. E.80.XIV.2), p. 21.

[130] See Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford, Clarendon Press, 1997), pp. 101, 102 and 150; see also John A. Dent, *Research Paper on the Social and Economic Rights of Non-Nationals in Europe* (ECRE), pp. 24 and 27.

[131] Convention concerning Migration for Employment (Revised 1949) (hereinafter "C97") and Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (hereinafter "C143").

[132] C97, article 11, para. 1. It will be noted that C143 includes in the definition a person "who has migrated" from one country to another.

[133] General Assembly resolution 45/158 of 18 December 1990. This Convention was inspired by the study on the condition of migrant workers undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at the request of the Economic and Social Council (see Economic and Social Council resolution 1789 (LIV) of 18 May 1973).

[134] While some of the main suppliers of labour are parties, none of the developed countries has yet become a party.

workers, members of the liberal professions and artistes who enter a country on a short-term basis, persons coming specifically for purposes of training or education and persons employed in a host country for a limited period of time to undertake a specific assignment.

120. On the other hand, the ILO conventions do not exclude persons with refugee status, in contrast to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which excludes refugees and stateless persons from its scope.[135] The rationale is that these categories of person already enjoy a specific international status that affords them special protection. It has been noted, however, that their exclusion from the scope of the Convention gives rise to an anomalous situation whereby asylum-seekers are regarded as "migrant workers" if they have permission to work in the host country but lose that status under the Convention once they are granted refugee or exile status.[136]

121. There are a variety of international legal instruments offering extensive protection to migrant workers.[137] With regard to the topic under consideration, the principle established is that migrant workers may not be expelled collectively, while individual expulsions are themselves subject to certain conditions, which will be examined subsequently, in the context of expulsion regimes.

122. We have just identified various categories of person who, by virtue of their situation (the fact that they are present, either legally or illegally, in the territory of a State of which they are not nationals), their legal status (refugees, asylum-seekers, stateless persons, persons with dual or multiple nationality who have been deprived of the nationality of the territorial State) or their activities (migrant workers) are among the aliens whose expulsion falls within the framework of this topic. On this basis, the Special Rapporteur wishes to propose, for the purpose of delimiting the scope of the topic, the following draft article:

"Article 1: Scope

(1) The present draft articles shall apply to any person who is present in a State of which he or she is not a national (*ressortissant*).

(2) They shall apply, in particular, to aliens who are present in the host country, lawfully or with irregular status, to refugees, asylum-seekers, stateless persons, migrant workers, nationals (*ressortissants*) of an enemy State and nationals (*ressortissants*) of the expelling State who have lost their nationality or been deprived of it."

II. Definitions

123. One of the chief difficulties of this topic lies in determining the exact meaning and content of such key concepts as "alien" and "expulsion". They should therefore

[135] See article 3 of the Convention, which lists the categories of person to whom the Convention does not apply.

[136] See R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford, Clarendon Press, 1997), p. 153.

[137] These legal instruments, some of universal, some of regional or bilateral character, will be enumerated and analysed in due course in subsequent reports, particularly when the principles applicable to, grounds for and consequences of expulsion are examined.

be defined as clearly as possible by seeking their exact meaning in law or, at the very least, the sense in which they are to be used for the purposes of this study and the draft articles to result from it. As stated in the preliminary report, the concept of expulsion can be understood only in relation to that of alien, and the latter will therefore be discussed first.

A. Alien

124. The term "alien" cannot be defined in itself but only what it is not, that is, a national or a person who holds the nationality of a given State or who is a *ressortissant* of that State. Accordingly, an alien is a person who is under the jurisdiction of another nation or State, a person who does not hold the nationality of the forum State.[138] It is in this sense that the term "alien" is used in the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, which applies it "to any individual who is not a national of the State in which he or she is present".[139]

125. "Alien" could thus be defined by starting from an opposition founded on a single criterion: the link of nationality with the territorial State. However, this criterion would not suffice to define *a contrario* all the persons covered by the category of "alien" as envisaged by this topic, particularly since the language of international law employs, in addition to the term "national", such synonyms as "citizen", "subject" and "*ressortissant*",[140] which do not necessarily imply the same type of legal link between the individual and the territorial State. Accordingly, the concept of "alien" will be approached by proceeding from the aforementioned opposite concepts. The advantage of such an approach is that, if one determines which of these concepts is best able to capture all of the persons who come under a State's jurisdiction, one will thereby identify the appropriate term for designating the relationship that binds an alien to his or her State of origin or affiliation.

126. In very specific terms, it is a matter of answering the following question: is the term "alien" to be understood solely as the opposite of a person holding the nationality of the territorial State (a national) or can it also be understood in relation to citizens, subjects or *ressortissants* of a State of origin or affiliation? Each of these ideas will be examined in turn.

1. National (*national*)

127. Used as a noun, the term "national" (*national*) means a person who possesses the nationality of the State in which he or she is present, nationality being the legal link that binds a person — a natural person in this case — to a State, either from birth or, subsequent to birth, by naturalization, marriage or operation of law. As stated by the International Court of Justice in its judgment in the *Nottebohm* case:

> "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a

[138] Jean Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), pp. 468-469.

[139] General Assembly resolution 40/144 of 13 December 1985.

[140] With regard to the term "subject", Alphonse Rivier writes: "Subject, national, citizen, *regnicole*: so many synonyms the opposite of which is alien" (see *Principes du droit des gens* (Paris, Arthur Rousseau, 1896), vol. I.

> social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It ... constitute[s] the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."[141]

128. An alien may be a national of a State of origin or affiliation or, on the contrary, a non-national of the territorial State or the forum State. However, this criterion of the bond of nationality is too restrictive where the concept of "alien" is concerned, since not every alien is necessarily a national of a given State.

129. In any case, we will refrain in the context of the present topic from defining "alien" by invoking the criterion of nationality. Not only are the conditions for acquiring nationality strictly a matter for the internal law of each State — the State being able to confer or deny its nationality as it sees fit — but the debate on the issue of nationality in international jurisprudence has also proved to be extremely complex.[142] With regard to international law, the Special Rapporteur, Mr. Christopher John Dugard, explained in his first report on diplomatic protection that, while the *Nottebohm* case was seen as authority for the requirement that there should be an effective or genuine link between the individual and the State of nationality, the judgment in this case was an "atypical decision", first, because there was suspicion about the manner in which Liechtenstein had conferred nationality on Nottebohm and, second, because the latter had close ties to Guatemala.[143] The ensuing debate revealed a doctrinal disagreement within the Commission itself concerning the criteria for the conferment of nationality: *jus soli*, *jus sanguinis*, nationality by adoption, legitimation, recognition, marriage or some other means, "involuntary naturalization", "voluntary naturalization", or "valid naturalization" to use the terminology applied in the *Flegenheimer* case,[144] the "bona fide" criterion? This controversy is best avoided, particularly since it is always national legislation that stipulates the criteria for the conferment of nationality, irrespective of the views expounded in the legal literature and case law.

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[141] International Court of Justice, *Nottebohm* (second phase), Judgment of 6 April 1955, *I.C.J. Reports 1955*, p. 23.

[142] See, for example, the debate on the issue in Advisory Opinion No. 7 of the Permanent Court of International Justice of 7 July 1923. Referring to the provisions of article 93 of the Treaty of Peace of 28 June 1919 between the Principal Allied and Associated Powers and Poland, the Court stated that "[they] considerably extend the conceptions of minority and population, since they allude on the one hand to the *inhabitants* of the territory", *P.C.I.J. Reports 1923, Series B*, No. 1, p. 14.

[143] See A/CN.4/506 and Corr.1, paras. 106-109, and *Yearbook of the International Law Commission 2000*, vol. II, (Part Two), paras. 461-462.

[144] See A/CN.4/506 and Corr.1 and Add.1, pp. 38-39, para. 111, and *Yearbook ... 2000*, vol. II, (Part Two), paras. 464-465.

2. Citizen

130. In international law, the word "citizen" means an individual enjoying political rights that enable him or her to participate in the life of the State.[145] This general definition does not enable the nature of the link between the citizen and the State in question to be determined. It may be a link of nationality for, in some sense, citizen is synonymous with national or *ressortissant*. This is confirmed by a legal opinion prepared by the United Nations Office of Legal Affairs, which in 1980 wrote that:

> "... 'Nationality' and 'citizenship' are largely within the competence of municipal law except where the discretion of the State is restricted by its international obligations. Both terms refer to the status of the individual in his relationship with the State. They are sometimes used synonymously but they do not necessarily describe the same relationship towards the State."[146]

131. Indeed, citizenship does not always coincide with nationality, at least, as far as the legal basis of each and the nature of the respective connection with the State are concerned. European Union law provides an excellent illustration of this point. It affirms that citizenship is that of the Union, while nationality is that of each member State. In this regard, article 17 of the Treaty establishing the European Community provides:

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. ...
>
> "2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby."[147]

132. Clearly, access to European citizenship is conditional on possession of the nationality of a State member of the European Union. At the same time, the enjoyment by a national of one State member of the Union of the rights associated with European citizenship in another State member of the Union of which that individual is not a national is not dependent on the latter legal link, that of nationality, but solely on the link of citizenship. In other words, a European cannot be an alien in any State member of the European Union, even though the individual only possesses the nationality of a single member State. In this respect, citizenship is broader than nationality and removes from the category of alien persons who would be included in it based solely on the criterion of nationality.

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[145] Article 25 of the International Covenant on Civil and Political Rights of 1966 (see General Assembly resolution 2200 A (XXI), annex) provides:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected (...);
>
> (c) To have access, on general terms of equality, to public service in his country."

[146] *United Nations Juridical Yearbook 1980*, p. 190.

[147] Article 17 [ex-article 8] of the Treaty establishing the European Community. It is to be noted that, under the Treaty, European citizens have numerous rights, including the right to move and reside freely within the territory of the member States (art. 18); the right to vote and to stand as candidates at municipal elections and elections to the European Parliament in the member State in which they reside (art. 19); the right to diplomatic protection by any member State in third countries in which their member State is not represented (art. 20); the right to petition and to apply to the ombudsman (art. 21).

3. Subject

133. A subject is a person under the authority of a monarch or prince to whom he or she owes allegiance. A subject is to a monarchy what a citizen is to a republic. One speaks, for example, of citizens of the French Republic, of the United States of America or of the Republic of Cameroon, but of Spanish, Belgian or British subjects. It is in this sense that the agreement concluded by Belgium and Spain on 1 March 1839, governing the right of the subjects of one State to acquire and inherit property in the other stipulated that "when goods acquired, by any means, by Belgian subjects in the States of His Majesty the King of Belgium, are exported, no taxes on emigration (*droit de détraction*) or immigration shall be levied on such goods ...".[148]

134. In the colonial era, the term "*sujets*" (subjects) was used to refer to indigenous nationals living in the colonies as opposed to "*citoyens*" (citizens) coming from the parent State.[149] A note by the Legal Service of the French Ministry of Foreign Affairs, dated 12 January 1935, stated: "In France, the term '*ressortissant*' is generally considered to include not only French persons in metropolitan France, but also colonial subjects and nationals of protectorate countries ... . As regards the subjects, the matter is clear; as regards the protégés, who are sometimes mentioned as a separate category from *ressortissants*, the matter is less certain ...".[150]

135. The *Dictionnaire de droit international public* adds that the term "subject" is also a "synonym of 'national' or 'citizen'".[149] But based on the foregoing, it can be said that the term "*ressortissant*" can cover all three categories of persons.

4. *Ressortissant*

136. In current usage, the term "*ressortissant*" is synonymous with "*national*" [both usually translated as "national" in English]. The synonymy of the two terms is evident in several international legal instruments[151] and in international jurisprudence.

137. In the question submitted by the Council of the League of Nations to the Permanent Court of International Justice in connection with the Court's Advisory Opinion no. 7, the Council seems to use "*ressortissant*" to mean "person possessing the nationality of". In its introduction to the question, the Council states: "The Polish Government has decided to treat certain persons, who were formerly German nationals [*ressortissants*], as not having acquired Polish nationality and as continuing to possess German nationality, which exposes them in Poland to the treatment laid down for persons of non-Polish nationality, and in particular of German nationality".[152]

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[148] See article 2, *Consolidated Treaty Series* (C.T.S.), vol. 88, p. 329.

[149] Jean Salman, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 1061.

[150] See A. Kiss, *Répertoire*, vol. II, No. 438, p. 236. See also A. Pillet and J. P. Niboyet, *Manuel de droit international privé* (Paris, Sirey, 1924), p. 66, footnote 2.

[151] For example, article 30, para. 1, of the European Convention on Establishment, signed at Paris on 13 December 1955, reads: "For the purpose of this Convention, 'nationals' [*ressortissants*] means physical persons possessing the nationality of one of the Contracting Parties".

[152] Permanent Court of International Justice, Advisory Opinion No. 7 of 15 September 1923, *P.C.I.J. Reports, Series B*, p. 6.

138. In its judgment in the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice held:

> "... the conception of a 'national' [*ressortissant*] also covers, in the Court's opinion, communes such as the City of Ratibor. It is true that, as has been explained in connection with the case of the Königs-und Laurahütte Company, the term 'national' [*ressortissant*] in the Geneva Convention generally contemplates physical persons. But a relation analogous to that which exists between physical persons and a State, and which is called nationality, also exists, although in a different form, in the case of corporations of municipal law".[153]

139. The question concerning the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* reveals a restrictive interpretation of the concept of "nationals" [*nationaux*], suggesting that other persons of the same origin and speaking the same language might not automatically be nationals [*nationaux*], and that the latter term does not mean precisely the same thing as "*ressortissants*". The Permanent Court also noted in this case that "if only discrimination on account of Polish nationality, origin or speech is prohibited, it would be possible for Danzig to exclude all Poles from its territory, provided that the exclusion applied equally to other foreigners",[154] thus underlining the distinction between nationals [*nationaux*] of a State and persons whose country of origin is that State.

140. However, it appears from the same opinion that the term "*ressortissant*" might well cover all three categories of persons concerned in this case. Indeed, the Permanent Court points out that when the Conference of Ambassadors drafted the convention on the legal status of the Free City of Danzig, it had before it three preliminary drafts, one of which was submitted by the City of Danzig and the other two by Poland: "The Danzig draft contained detailed provisions relating to the rights of the nationals [*ressortissants*] of the two contracting Parties. ... The second Polish draft contained provisions for national treatment of Polish nationals [*ressortissants*] based on the principle of reciprocity". The Permanent Court adds that "the question of national treatment of Polish nationals [*ressortissants*] ... had been raised in both the Danzig and the Polish drafts", but that "instead of granting to Polish nationals [*ressortissants*] at Danzig national treatment", the Conference of Ambassadors dealt with the matter in article 30, which accords "to Polish nationals [*nationaux*] and other persons of Polish origin or speech ... not national treatment, but the régime of minority protection".[155]

141. In its Advisory Opinion of 6 April 1935 concerning *Minority Schools in Albania*, the Permanent Court of International Justice affirmed the inclusive nature of the term "*ressortissant*" vis-à-vis "*national*" when it wrote that in order to attain the idea underlying all treaties for the protection of minorities, it was necessary first to "ensure that nationals[156] belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals [*ressortissants*] of the State".[157] The Permanent Court also noted that "all Albanian

[153] Judgment of 25 May 1926, *P.C.I.J. Reports, Series A*, No. 7, p. 74.
[154] Advisory Opinion of 4 February 1932, *P.C.I.J. Reports, Series A/B*, No. 42, p. 41.
[155] Ibid., p. 34.
[156] "*Ressortissants*" in French.
[157] Advisory Opinion of 6 April 1935, *P.C.I.J. Reports, Series A/B*, No. 62, p. 17.

nationals [*ressortissants*] enjoy the equality in law stipulated in article 4"[158] of the Declaration of 2 October 1921, and established that paragraph 1 of article 5 of the Declaration "confers on Albanian nationals [*ressortissants*] or racial, religious or linguistic minorities the right that is stipulated in the second sentence of that paragraph ..."[159]

142. In the case concerning *Rights of Nationals of the United States of America in Morocco (France vs. United States of America)*, as in all cases brought before the International Court of Justice and its predecessor in which nationals of one of the parties are concerned, the term "*ressortissant*" is translated as "nationals" in English. In this case, France asked the Court to adjudge and declare that "the privileges of the nationals of the United States of America in Morocco are only those which result from the text of Articles 20 and 21 of the Treaty of September 16th, 1836 ..."[160] The Government of the United States held that "the jurisdiction conferred upon the United States by the Treaties of 1787 and 1836 was jurisdiction, civil and criminal, in all cases arising between American citizens", and that the United States had acquired in Morocco, through the effect of the most-favoured-nation clause and through custom, "jurisdiction in all cases in which an American citizen or protégé was defendant".[161] It is true that article 21 of the treaty of 1836 uses the term "citizen" (*citoyen*)[162] and not "national" (*ressortissant*), but it is clear that the term is being used to mean the same thing as "national". The Court itself used the two terms as equivalents. In stating the reasons for the judgment, the Court recalled that the most extensive privileges in the matter of consular jurisdiction granted by Morocco were granted in respect of "British nationals" (*ressortissants*) on the basis of the General Treaty with Great Britain of 1856; that jurisdiction in civil and criminal matters was established under the Spanish Treaty of 1861 for cases in which "Spanish nationals [*ressortissants*] were defendants"; and that, accordingly, the United States had acquired, by virtue of the most-favoured-nation clauses, civil and criminal consular jurisdiction "in all cases in which United States nationals [*ressortissants*] were defendants."[163] In one section of the operative part of the judgment, the Court found, unanimously, that the United States of America was not entitled to claim "that the application to citizens of the United States of all laws and regulations in the French Zone of Morocco requires the assent of the Government of the United States, but that the consular courts of the United States may refuse to apply to United States citizens laws or regulations which have not been assented to by the Government of the United States".[164] The terms "*nationaux*" (nationals), "*citoyens*" (citizens) and "*ressortissants*" (nationals) appear, at first glance, to be equivalent. However, is it not apparent in the reference made to this case by the United States, in its submission, to "all cases in which an American

[158] Ibid., p. 19.
[159] Ibid., p. 22.
[160] Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 179. In French: "Les privilèges des ressortissants des Etats-Unis d'Amérique au Maroc sont uniquement ceux qui résultent du texte des articles 20 et 21 du traité du 16 septembre 1836 (...)".
[161] Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 186.
[162] That article stipulated "If a citizen of the United States should kill or wound a Moor, or, on the contrary, if a Moor shall kill or wound a citizen of the United States, the law of the Country shall take place, and equal justice shall be rendered, the Consul assisting at the trial ...". (Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 189.)
[163] Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 190.
[164] Ibid., p. 213.

citizen or protégé was defendant", that the term "*ressortissant*" might have a broader meaning in international law than "national" (*national*) and "citizen" (*citoyen*)?

143. The tie of nationality being the foundation for a State's action with regard to diplomatic protection, the term "*ressortissant*" as used in various cases concerning diplomatic protection brought before the Court is synonymous with "*national*" or "person having the nationality of".

144. In the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*,[165] the parties and the Court itself used the terms "*ressortissant*" and "*citoyen*" interchangeably and in a limited sense to mean "national" or "individual of American nationality". Thus, in its submissions on the case, the United States Government maintained that it had carried out its mission in Iran "with the aim of extricating American nationals [*ressortissants*]" who had been victims of the Iranian armed attack on its embassy,[166] and had demanded the immediate "release of all United States nationals [*ressortissants*]" held in the Embassy building[167] and reparation "in its own right and in the exercise of its right to diplomatic protection of its nationals [*ressortissants*]".[168] Recalling the facts of the case in its Judgment, the Court noted that after the Iranian "militants" had seized the embassy, "other United States personnel and one United States private citizen [*ressortissant*] seized elsewhere in Tehran" had been subsequently taken to the Embassy and held hostage.[169] The Court also referred, some paragraphs later, to the "total number of United States citizens [*citoyens*] seized"[170] and to "two other persons of United States nationality [*ressortissants*] not possessing either diplomatic or consular status."[171] Visas issued "to Iranian citizens [*citoyens*] for future entry into the United States were cancelled" and the United States Government prohibited travel by its citizens [*ressortissants*] to Iran.[172] The Court, in stating the reasons for its Judgment, noted that "the United States Government may have had understandable preoccupations with respect to the well-being of its nationals [*ressortissants*] held hostage in its Embassy for over five months",[173] In point 3 of the operative part of its Judgment, it decided that Iran must immediately terminate the unlawful detention of the diplomatic and consular staff "and other United States nationals [*ressortissants*] now held hostage in Iran".[174]

145. Also using the term "*ressortissant*" in the sense of "national", Germany considered in its submissions in the *LaGrand case (Germany v. United States of America)*[175] that by not informing Karl and Walter LaGrand without delay following their arrest of their rights under the Vienna Convention on Consular Relations, the

[165] International Court of Justice, Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3-46.
[166] Ibid., p. 18, para. 32.
[167] Ibid., p. 6, para. 7.
[168] Ibid., pp. 6 and 7.
[169] Ibid., p. 12, para. 17.
[170] Ibid., p. 13, para. 21.
[171] Ibid., p. 13, para. 22.
[172] Ibid., p. 17, para. 31.
[173] Ibid., p. 43, para. 93.
[174] Ibid., p. 44, para. 95.
[175] International Court of Justice, Judgment of 27 June 2001, *I.C.J. Reports 2001*; see also the Breard case (*Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, *I.C.J. Reports 1998*).

United States of America had "violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals [*ressortissants*]"; and that pursuant to those international legal obligations, the United States of America should provide Germany with the guarantee that "in any future cases of detention of or criminal proceedings against German nationals [*ressortissants*]", the law and practice of the United States of America would not hinder the application of international law.[176] The Court, recalling the facts of the case, noted that "Walter LaGrand and Karl LaGrand were born in Germany in 1962 and 1963, respectively, and were German nationals [*ressortissants*]".[177] It did not accept the objections of the United States of America that Germany did not have "standing to assert those rights on behalf of its nationals [*ressortissants*]".[178] The Court's use of the term "*ressortissant*" as synonymous with "person possessing the nationality of" becomes very clear when the Court "concludes that article 36, paragraph 1, creates individual rights, which, by virtue of article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[179] The Court also states, in point 7 of the operative part of its Judgment, that "should nationals [*ressortissants*] of the Federal Republic of Germany nonetheless be sentenced to severe penalties" without their rights under the Vienna Convention having been respected, the United States of America, by means of its own choosing, should allow the review and reconsideration of the conviction.[180]

146. In the case concerning *Avena and other Mexican Nationals (Mexico v. United States of America)*, Mexico, in its final submissions, asked the Court to adjudge and declare that the United States of America had "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals [*ressortissants*]".[181] It also asserted its own claims, basing them on the injury which it contended that "*it has itself suffered, directly and through its nationals* [*ressortissants*]".[182] The use of the term "*ressortissant*" as synonymous with "national" or "possessor of the nationality of a State", as noted in the *LaGrand* case, is confirmed here. After recalling the text of paragraph 77 of the Judgment issued in the *LaGrand* case,[179] the Court examined "the question of the alleged dual nationality of certain of the Mexican nationals [*ressortissants*] the subject of Mexico's claims".[183] The United States objected to that claim, maintaining that it was "an accepted principle that, when a person arrested or detained in the receiving State is a national [*ressortissant*] of that State, then even if he is also a national [*ressortissant*] of another State party to the Vienna Convention, Article 36 has no application ...; and Mexico has indicated that, for the purposes of the present case, it does not contest that dual nationals have no right to be advised of their rights under Article 36".[183] The Court pointed out that Mexico, in addition to seeking "to exercise diplomatic protection of its nationals [*ressortissants*]", was making a claim in its own right, and that it could claim a breach of Article 36 of the Vienna Convention in relation to "any of its nationals [*ressortissants*]", and the United States of America

[176] Judgment of 27 June 2001, *I.C.J. Reports 2001*, paras. 11 and 12.
[177] Ibid., para. 13.
[178] Ibid., para. 42.
[179] Ibid., para. 77.
[180] Ibid., para. 128.
[181] International Court of Justice, Judgment of 31 March 2004, *I.C.J. Reports 2004*, para. 40.
[182] Ibid. The term is used in this way in many other paragraphs of the Judgment. In addition to those cited above, see also paragraphs 69 and 102.
[183] Ibid., para. 41.

was "thereupon free to show that, because the person concerned was also a United States national [*ressortissant*]", article 36 had no application to that person.[184] Even more significantly, the Court noted that Mexico claimed to have met the burden of proof to show that the 52 persons involved in the case "were Mexican nationals [*ressortissants*]" "by providing to the Court the birth certificates of these nationals [*ressortissants*], and declarations from 42 of them that they have not acquired United States nationality".[185] If the burden of proof was to be shared in this instance, it was because, in the view of the United States, "persons of Mexican nationality may also have acquired United States citizenship by operation of law, depending on their parents' dates and places of birth, places of residency, marital status at time of their birth and so forth".[186] The Court found that it was for Mexico to show that "the 52 persons listed ... held Mexican nationality at the time of their arrest", and noted that to that end Mexico had "produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States".[187] It is clear that, in the language of the parties and of the Court, no distinction is made between the notions of "*ressortissant*", "national" and even "citizen". The United States told the Court that "millions of aliens reside, either legally or illegally, on its territory", and moreover that "its laws concerning citizenship are generous".[188] The Court pointed out that "the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national", and that in view of the large numbers of foreign nationals living in the United States, those very circumstances suggested that "it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention".[188] It noted that no evidence had been brought before it to suggest that there were, in the case of one of the persons concerned (Mr. Salcido, case No. 22), at the same time "indications of Mexican nationality", which should have caused rapid enquiry by the arresting authorities.[189] The Court also referred to "Mexican nationals [*ressortissants*]" in points 6, 7, 9 and 11 of the operative part of the judgment.[190]

147. Side by side with this limited meaning of "*ressortissant*" as "possessing the nationality of", the term also has an overly broad meaning in international law, especially when used in conjunction with the adjective "enemy". The term "*ressortissant enemi*" [enemy alien] denotes a natural or legal person believed by a belligerent to be subject by law to the authority of an enemy Power, depending on the criteria used to determine that connection, which may vary in domestic laws from one State to another.[191] The crux of the matter is the loyalty of a person to such a Power or, more precisely, and as the Court indicated, citing the reply of the Government of Liechtenstein in the *Nottebohm* case, "nationality, residence, personal or business associations as evidence of loyalty or inclusion in the Black List".[192] Clearly, the range of persons to whom this applies is very broad, since it

[184] Ibid., para. 42.
[185] Ibid., para. 55.
[186] Ibid., para. 56.
[187] Ibid., para. 57.
[188] Ibid., para. 64.
[189] Ibid., para. 66.
[190] Ibid., para. 153.
[191] Jean Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 1001.
[192] International Court of Justice, *Nottebohm* (1955) (*Liechtenstein v. Guatemala*), Reply of the Government of Liechtenstein, in *Pleadings, Oral Arguments, Documents, Comprising Texts, Maps and Charts*, vol. I, pp. 410-411.

suffices that they should have shown evidence of their loyalty to the enemy Power in question without there being any need to establish their nationality[193] in order to consider them "*ressortissants*" of that Power.

148. The Special Rapporteur does not envisage the concept of "*ressortissant*" in such a broad sense in the context of the present topic. There exists an intermediate meaning that falls between the limitation of the term to the idea of nationality and its extension to all persons that a State at war may decide to consider enemy aliens on the basis of their culpable loyalty to an enemy State. Of course, States may decide, by agreement, to assign to the term whatever meaning they wish. However, the Special Rapporteur is striving for a definition that, while broad, remains precise, applying not only to nationals but also to persons who are subject to the authority of a given State as the result of a particular legal connection, such as status of refugee or asylum-seeker, the legal relationship resulting from a situation of statelessness, or even a relationship of subordination, such as that created by a mandate or protectorate. For example, according to a note dated 12 January 1935 by the Legal Service of the French Ministry of Foreign Affairs, "in France, the term '*ressortissants*' is generally considered to include not only French persons in Metropolitan France but also colonial subjects and nationals of protectorate countries ... As regards the subjects, the matter is clear; as regards the protégés, who are sometimes mentioned as a separate category from *ressortissants*, the matter is less certain; therefore the following formula is suggested: 'All French *ressortissants*, including French protégés'."[194]

149. However, the precise sense in which the term is to be used in the context of the present topic is conveyed in the award rendered by the French-German Mixed Arbitral Tribunal on 30 December 1927 in the *Falla-Nataf and brothers v. Germany* case:

> "Whereas the defendant contends that the claimant, being of Tunisian nationality and as such a French protégé, may not be regarded as a *ressortissant* of an Allied or Associated Power [...] Whereas the term '*ressortissant*' as used in article 297 of the Treaty of Versailles is not restricted to *nationaux* of a State, but applies also to any person who, as the result of a legal relationship other than nationality, comes under the authority of a State."[195]

150. "*Ressortissant*" is therefore understood to mean any person who, as the result of any legal relationship, including nationality, comes under the authority of a given State.

151. In view of the above considerations, it is reasonable to propose that the term "alien" denotes, in the context of this topic, a *ressortissant* of a State other than the receiving State or the territorial State, or, conversely, a "*non-ressortissant*"[196] of the latter.

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[193] Note by the Legal Service of the French Ministry of Foreign Affairs, 18 February 1937; see Alexandre Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. VI, No. 883, p. 441.

[194] A. Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. II, No. 438, p. 236.

[195] See *Recueil des décisions des tribunaux mixtes* institués par les traités de paix, Recueils Sirey (Paris, 1928), vol. VII, p. 653.

[196] A Working Group of the Third Committee of the United Nations General Assembly set out a somewhat confused explanation of the concept of "non-citizen" in a document of 24 October 1980, *United Nations Juridical Yearbook 1980*, p. 209.

152. Of course, a concept as broad as that of "*ressortissant*" presents the risk that individuals may claim falsely or purely opportunistically to be *ressortissants* of a State when in fact they neither possess its nationality nor have any solid connection with it, simply because they prefer, for various reasons, to be expelled to that State. It cannot be denied that such a risk exists, and in fact such situations are known to arise frequently in practice. However, it is the responsibility of each State to preserve its nationality, its citizenship and the other legal connections that link its *ressortissants* to it, by ensuring that they acquire, or are issued by its authorities, official documents attesting to their status, particularly civil registry documents, national identity cards and passports. It is not the responsibility of the expelling State to verify the authenticity of those documents, but of course that of the State to which the person being expelled claims to belong.

B. Expulsion

153. The word "expulsion" is generally used in a broad and non-specific sense to denote a set of measures or actions carried out with the aim or having the effect of compelling an individual to leave the territory of a State. Expulsion is thus understood in relation to a given territorial space or, more broadly, to the territory or territories over which the expelling State exercises sovereignty. Its exact meaning will be derived, on the one hand, by distinguishing it from certain closely related concepts, and by determining the exact role played by the crossing of the territorial frontier of the expelling State in the process of expulsion.

1. Expulsion and related concepts

154. The term "expulsion" exists side by side with many related terms that have points in common, some of which may form part of the expulsion process as envisaged in the context of the present topic, while others are quite distinct. Particular attention will be paid to the terms "deportation", "extradition", "removal", "reconduction to the frontier", "refoulement", "non-admission" and "transfer".

(a) Deportation

155. The term "deportation" has a specific historical background in that it is closely linked to certain dramatic events during the Second World War. In that context, and more generally in the context of the laws of war, it is understood as the forced displacement or forced transfer of individuals or groups of the civilian population — who are protected persons under the provisions of the Geneva Conventions of 1949 — from an occupied territory. In that regard, article 6 of the Charter of the International Military Tribunal at Nuremberg, contained in the Agreement concerning Prosecution and Punishment of the Major War Criminals of the European Axis concluded in London on 8 August 1945, refers to "the deportation to slave labour or for any other purpose of civilian population of or in occupied territory"[197] as one of the crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.

156. The principle is that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are

[197] See United Nations, *Treaty Series*, vol. 82, No. 251, p. 288.

prohibited".[198] In 1992 the Security Council expressed its "grave alarm" at reports of "mass forcible expulsion and deportation of civilians" within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina.[199]

157. Outside this historical context and that of the law of war, the term "deportation" is not used in a uniform sense in international law. The terms "deportation" and "expulsion" appear to be regarded as interchangeable in Anglo-American practice, despite the fact that, technically, there is a difference between the two procedures.[200] In international law a distinction is made between deportation, meaning the power of a State to expel an alien forcibly to any country chosen by the deporting State, and expulsion, meaning that an alien may be expelled from the territory of the expelling State, which should seek the agreement of the person to be expelled in determining the destination, which should in all cases be the State of which that person is a national/*ressortissant*.

158. It has been suggested that the term "deportation" should be understood as meaning measures undertaken by the competent national authority to bring about the expulsion of aliens,[201] the rationale being that authors in the Anglo-Saxon legal system, as has been seen, use the words "expulsion" and "deportation" interchangeably to mean the same thing.[202] While this may not raise any particular semantic problems in the English language, the word is heavily freighted with connotations as a result of the historical context outlined above and is not understood in the same way in all languages. In particular, it would be difficult to convey in French the idea that deportation could be a simple auxiliary measure or the actual execution of the expulsion. Therefore, the Special Rapporteur proposes that the term "deportation" should be understood, at least as far as French is

[198] It is conceded, however, that "the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased." (article 49 of the Fourth Geneva Convention of 1949; see also articles 70 and 147 of the same Convention).

[199] Security Council resolution 771 (1992) of 13 August 1992.

[200] See Louis B. Sohn and Thomas Buergenthal, eds., *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23 (Washington, D.C., American Society of International Law, 1992), p. 90, para. 12.03. *Black's Law Dictionary*, Eighth ed., Bryan Gardner, Editor-in-Chief (Thomson West, 2004), p. 471, defines the word "deportation" as "the act or an instance of removing a person to another country; esp., the expulsion or transfer of an alien from country". See also *A Dictionary of Modern Legal usage*, 2nd ed. (Oxford University Press, 1995). This variation in the use of the term "deportation" can also be seen in some national legislation where it is barely distinguished from expulsion; for example, see the legislations of Nigeria, the Republic of Korea and Spain in A/CN.4/565, para. 183, note 371.

[201] A/CN.4/565, para. 184.

[202] For example, Roman Rewald speaks of "expulsion of aliens, which involves deportation and extradition" ("Judicial Control of Administrative Discretion in the Expulsion and Extradition of Aliens", *American Journal of Comparative Law*, vol. 34 (1986), p. 451); "Governing Rule 12", published in *Studies in Transnational Legal Policy*, vol. 23 (1992), p. 89, is entitled "Expulsion or Deportation of Aliens"; in the Editorial Notes in *Minnesota Law Review*, vol. 37 (1952-1953), p. 440, it is stated that "Recent Supreme Court decisions have helped to crystallize the always-competing policies underlying the question of the constitutional restraints on the handling of the expulsion and exclusion powers. The number of deportations is increasing and the Attorney General announced that he would exclude a long-time resident from re-entry into the country where he has made his home."

concerned, in the same sense in which it is used in the law of war, as described above, and its usage limited to that context.

(b) Extradition

159. Extradition is an institution of judicial cooperation between States. It is a legal mechanism whereby State A (the "requested State") voluntarily surrenders an individual (in this case, a defendant) present on its territory to State B (the "requesting State") at the latter's request,[203] where that request is made with a view to instituting criminal proceedings or enforcing a sentence.[204]

160. Unlike expulsion, therefore, extradition is not a unilateral decision taken by one State. It is the response of one State (the requested State) to the request of another (the requesting State). Whereas expulsion is legally based on the domestic law of the expelling State, the legal basis of extradition does not derive in its entirety from the domestic legal order of the extraditing State; usually it is based on a combination of the national legislation of the States involved in the extradition procedure, together with the provisions of bilateral and multilateral international legal instruments. The mechanism is also underpinned by the principle of reciprocity. Pursuant to article 1 of the 1957 European Convention on Extradition, the Contracting Parties "undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order".

161. When the obligation to extradite is laid down neither by treaty nor by customary law — as was claimed, for example, by Peru in the *Haya de la Torre* case — whether or not to proceed with extradition is the sovereign decision of the requested State. Such a decision, however, is invariably taken in response to a request by the requesting State; a State may not extradite *proprio motu*. On the other hand, it may deny such a request, in particular when its own nationals are concerned. In a joint declaration appended to the order issued by the International Court of Justice on 14 April 1992 in response to the request for the indication of provisional measures in the *Lockerbie* case, four members of the Court wrote:

> "1. Before the Security Council became involved in the case the legal situation was, in our view, clear. The United Kingdom and the United States were entitled to request Libya to extradite the two Libyan nationals charged by the American and British authorities with having contributed to the destruction of the aeroplane lost in the Lockerbie incident. For this purpose they could take any action consistent with international law. For its part, Libya was

[203] Ian Brownlie writes: "Where this cooperation rests on a procedure of request and consent, regulated by certain general principles, the form of international judicial assistance is called extradition" (I. Brownlie, *Principles of Public International Law*, 8th edition (Oxford University Press), p. 318).

[204] See, for example, Sir Arthur Jennings and Sir Robert Y. Watts, eds., *Oppenheim's International Law, Volume I — Peace*, 9th ed. (1996), para. 415. While Giorgio Gaja believes that extradition may be regarded as a sub-category of expulsion to which particular rules apply, he also acknowledges that, owing to its specific regime, it is generally regarded as a distinct legal measure and, as such, is excluded from the scope of any study on expulsion: G. Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3 (1999), pp. 283-314, in particular p. 291.

entitled to refuse such an extradition and to recall in that connection that, in common with the law of many other countries, its domestic law prohibits the extradition of nationals.

"2. In so far as general international law is concerned, extradition is a sovereign decision of the requested State, which is never under an obligation to carry it out. ..."[205]

(c) Removal

162. Removal is a generic term encompassing the different ways or procedures of excluding an alien from a given country. Strictly speaking, it is not a legal term although it is commonly used in French legal literature on the expulsion of aliens.[206] The term "*éloignement*" (removal) is understood to refer both to "expulsion" and to what is known under French law as "*la reconduite à la frontière*" (reconduction to the frontier).[207]

163. Nevertheless, in addition to this distinction, based mainly on the different rules of procedure applicable to the two measures, it is also noted that "whatever the motive, the removal of aliens derives ... from a single legal regime, that of expulsion".[208]

164. Account should therefore be taken of the proposal made by the Special Rapporteur in his preliminary report to use the terms "expulsion" and "removal" in a broad sense, a proposal approved by the International Law Commission.[209]

(d) Reconduction to the frontier

165. Under French law, in which this term appears in the legislation on the entry and stay of aliens, a distinction is made between expulsion and reconduction to the frontier. The term "expulsion" is applied to the removal of aliens, with regular or irregular status, whose presence on French territory poses a serious threat to public order,[210] whereas the expression "reconduction to the frontier" refers to measures to

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[205] International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 24.

[206] See, for example, Rudolph d'Haëm, *La reconduite à la frontière des étrangers en situation irrégulière* (Paris, Presses Universitaires de France (Que sais-je?), 1997). He refers to the consensus in France since 1981 on a specific procedure allowing for "the removal from French territory of aliens who have entered it and resided there in irregular conditions" (p. 3), to "escort to the border" as a "type of removal" with only temporary effect (p. 4), and to the "effective removal of the clandestine alien" (p. 4), or of "aliens in the process of removal" (p. 5); see also Catherine Teitgen-Colly and François Julien-Laferrière, "Chronique de législation: étrangers", *L'actualité juridique droit administratif*, 20 November 1998, pp. 927-929; Danièle Lochak, "L'entrée et le séjour des étrangers en France: une législation sous influence", *L'actualité juridique droit administratif*, 20 October 1969, p. 595.

[207] Rudolph d'Haëm, *La reconduite à la frontière des étrangers en situation irrégulière* (Paris, Presses Universitaires de France (Que sais-je?), 1997), p. 3: he considers that "reconduction to the frontier" is a "special removal measure" as distinct "from the other removal measure that is expulsion".

[208] Ibid., p. 5.

[209] See A/CN.4/554, para. 13.

[210] See article 23 of Ordinance No. 45-2658 of 2 November 1945 on the conditions of entry and residence of aliens in France.

remove aliens with irregular status with regard to the alien police legislation.[211] Like expulsion in the restricted sense used in French legislation, reconduction to the frontier is subject to the issue of an order, the difference being that the order is issued, not by the Minister of the Interior, but by the Commissioner of the Republique. Unlike those subjected to expulsion *stricto sensu*, aliens who are escorted to the border do not have the right of appeal to the Refugee Appeals Commission but may return to France, whereas expelled aliens must await the repeal of the order in question.[212]

166. This distinction is not altogether clear, however, inasmuch as under Act No. 9 of 10 January 1980,[213] for example, reconduction to the frontier is regarded simply as a means of enforcing expulsion measures; section 6 of that law provides that "an expelled alien may be conducted to the frontier". Nonetheless, both cases involve measures of "*éloignement*" to remove the alien from the territory, the rest being a matter of the procedure and legal force pertaining to each measure. Consequently, at least for the purposes of the topic in question, it is preferable not to make a distinction between "expulsion" and "reconduction to the frontier", but to consider the latter as one of a number of expulsion measures, in the broad sense of the term "expulsion".

(c) Refoulement

167. At first glance, it would appear that the term "refoulement" refers to the exclusion from a State's territory of recently arrived clandestine immigrants whereas expulsion would apply to persons with legal status, asylum-seekers or those requesting refugee status, and possibly also to individuals with irregular status who have lived for a long time in the territory of the expelling State. More simply, refoulement could be regarded as applying to aliens with irregular status, whereas expulsion applies to aliens with legal status. Arguments for the latter line of reasoning could be found in the note on international protection presented by the United Nations High Commissioner for Refugees on 9 August 1984, according to which "the observance of the principle of non-refoulement is closely related to the determination of refugee status".[214] This statement might appear to suggest that there might be refoulement of a person refused refugee status and non-refoulement in the opposite situation. As shown by the title of article 33, "Prohibition of

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[211] For the legal regime governing this concept in France, see in particular Mohamed Ladhari, "La reconduite à la frontière des étrangers en situation irrégulière", *Les Petites Affiches*, 1990, No. 6, pp. 13-27; "La reconduite à la frontière des demandeurs d'asile", Pleadings before the Council of State, Assembly of 13 December 1991, (1) *Mr. N'Kodia (Alfonso)*, (2) *Préfet de l'Hérault c. M. Dakoury*, *Revue française de droit administratif (R.F.D.A)*, vol. 8, No. 1, Jan.-Feb. 1992, p. 91; Florence Benoît Rohmer, "Reconduite à la frontière: développements récents", *Revue du droit public et de la science politique en France et à l'étranger*, 1994, No. 1, p. 429; Rudolph d'Haem, *La reconduite à la frontière des étrangers en situation irrégulière* (Paris, Presses Universitaires de France (Que sais-je?), 1997), p. 3.

[212] N. Guimezanes, "La loi du 9 septembre 1986 sur les conditions d'entrée et de séjour des étrangers en France", *La Semaine juridique* (Doctrine) 1987, 3270.

[213] See *Journal Officiel de la République française*, 11 January 1980, p. 71; Dominique Turpin, "La réforme de l'ordonnance du 2 novembre 1945 sur la condition des étrangers par la loi du 10 janvier 1980", *Revue critique de droit international privé*, 1980, p. 41; J.-Y. Vincent, "Le nouveau régime de l'entrée et du séjour des étrangers en France", *Revue de droit administratif*, 1980, p. 363.

[214] See the note on international protection submitted on 9 August 1984 by the United Nations High Commissioner for Refugees, A/AC.96/643, para. 17.

expulsion or return ("refoulement")", of the 1951 Convention relating to the Status of Refugees, it is clear that the Convention distinguishes between the two terms; yet neither the content of article 33 nor that of article 1, containing the definition of the term "refugee", enables us to differentiate between the two expressions.[215]

168. Another distinction made between expulsion and refoulement is that expulsion is a measure taken to protect public order, resorted to only when the presence of an alien on the territory poses a serious threat to that order, whereas refoulement is a measure taken to remove an alien with irregular status: "The prohibition against expelling an alien solely on the grounds of having violated the regulations regarding stay does not mean that he or she is immune from any measure to remove him or her from the territory. Now, as before 1980, expulsion is being replaced by refoulement ...".[216] Commenting on the amendment of the Ordinance of 2 November 1945 by the Act of 10 January 1980, another author writes: "Aliens with irregular status are no longer subjected to refoulement, they are expelled".[217]

169. In any event, legal writers are not unanimous on this score, and the terminology is by no means sufficiently clear. For example, one author has written that the French law of 9 January 1980 on the prevention of clandestine immigration reduced France's obligations under the relevant international conventions "merely to a prohibition against refoulement or expulsion towards a territory where the life or freedom of the persons concerned would be threatened".[218] The same author adds that the situation of candidates for refugee status is relatively uncertain and in no way prevents an expulsion order being issued;[219] that most requests for refugee status are rejected, after an appeal — with suspensive effect — before the Refugee Appeals Commission; and that it becomes difficult, after a long period of three years, reduced in 1985 to one year "to return ('refouler') those concerned", many of whom disappear without trace.[219] With regard to the candidates for refugee status in a well-known case brought before the Administrative Court of Pau, this author writes that "the individuals concerned, who were neither returned *manu militari* nor escorted to the frontier, were better treated than many asylum-seekers ...".[220]

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[215] See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841, art. 3; the Declaration on Territorial Asylum of 1967 (General Assembly resolution 2312 (XXII), art. 3, para. 1); the OAU Convention Governing Specific Aspects of Refugee Problems in Africa of 1969, art. II, para. 3; and the Pact of San José, Costa Rica, United Nations, *Treaty Series*, vol. 1144, No. 17955, art. 22, para. 8.

[216] J.-Y. Vincent, "La réforme de l'expulsion des étrangers par la loi du 29 octobre 1981", *La Semaine juridique* (Doctrine), 1982, 3054.

[217] Dominique Turpin, "La réforme de l'ordonnance du 2 novembre 1945 sur la condition des étrangers par la loi du 10 janvier 1980", *Revue critique de droit international privé*, 1980, p. 42.

[218] Dominique Turpin, "Les nouvelles conditions de l'expulsion des réfugiés", *Revue française de droit administratif*, vol. 2, No. 2, March-April 1986, p. 140.

[219] Ibid., p. 141.

[220] Ibid. We should point out that a person who is subjected to refoulement because he or she has been refused admission could run the risk of persecution in his or her country of origin. What can be done? Not yet having the status of refugee, that person ought not to be entitled to benefit from the provisions of article 33, paragraph 1, of the Convention relating to the Status of Refugees. It is this interpretation that seems to have inspired the United States Supreme Court in the case *Sale v. Haitian Centers Council* (opinion of 21 June 1993, *International Legal Materials*, vol. 32 (1993), pp. 1052 ff.); see, however, the contrary opinion of Mr. Giorgio Gaja, who bases his critique in particular on a report of the Inter-American Commission on Human

170. As can be seen, no real terminological distinction can be drawn among the three terms "expulsion", "reconduction to the frontier" and "refoulement"; they are used interchangeably, without any particular semantic rigour. The word "expulsion" will consequently be used in the context of the present topic as a generic term to mean all situations covered by all three terms and many others, such as "return of an alien to a country"[221] or "exclusion of an alien",[222] this list not being exhaustive.

(f) Non-admission

171. A sovereign State is always free to refuse any alien access to its territory.[223] Accordingly, the preamble of the International Rules on the Admission and Expulsion of Foreigners adopted by the Institute of International Law on 9 September 1892 proclaimed that "for each State, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is a logical consequence of its independence".[224]

172. This sovereign right of a State to oppose entry to its territory by undesirable aliens, or those not meeting the conditions set by the laws on entry and stay, is valid even for aliens who have formally filed an application for refugee status[225] while they remain in the international zone and in centres where candidates for admission to the country's territory are detained. The criterion of crossing the frontier or

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Rights, according to which "the United States Government [had] breached its treaty obligations in respect of article 33 of the Convention relating to the Status of Refugees because this provision has 'no geographical limitations'" (G. Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3 (1999), p. 291). This interpretation is no doubt correct from the standpoint of the protection of human rights. But if we consider the refoulement to be a consequence of the non-admission, and since the non-admission concerns aliens who have not yet entered the territory of the State carrying out the refoulement — in other words aliens who have not yet crossed the frontier, as it is defined for the purposes of the present topic, then one cannot impose on the State refusing to admit an alien the same obligations that it would have in cases of expulsion; we must agree, therefore, that non-admission and expulsion are not the same thing. This, at least, is the conclusion reached by the Special Rapporteur with regard to the exact content of each of these two concepts.

221 Term found, for example, in the pleading of the Government Commissioner, Romy Abraham (Council of State, Assembly of 13 Dec. 1991 (2 cases): *(1) Mr. N'Kodia (Alfonso). (2) Préfet de l'Hérault c. M. Dakoury*, *R.F.D.A.*, vol. 8, No. 1, Jan.-Feb. 1992, p. 93 alongside the expression "reconduction to the frontier" (ibid., p. 90); see also Rudolph d'Haëm, *La reconduite à la frontière des étrangers en situation irrégulière* (Paris, Presses Universitaires de France (Que sais-je?), 1997), p. 111.

222 Expression commonly used in the English-language legal literature; see, for example, "Constitutional Restraints on the Expulsion and Exclusion of Aliens", *Minnesota Law Review*, vol. 37, (1952-1953), p. 440; see also the Advisory Opinion of the Permanent Court of International Justice of 4 February 1932, *P.C.I.J. Reports*, Series A/B, No. 44.

223 See Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique", *Recueil des cours* (Collected Courses of the Hague Academy of International Law), vol. 18 (1927-III), p. 456; see also N. Guimezanes, "La loi du 9 septembre 1986 sur les conditions d'entrée et de séjour des étrangers en France", *La Semaine juridique*, No. 3, p. 3270.

224 *Annuaire de l'Institut de droit international*, vol. XII, p. 218. It went on: "considering, however, that humanity and justice oblige States to exercise this right while respecting, to the extent compatible with their own security, the rights and freedom of foreigners who wish to enter their territory or who are already in it".

225 Dominique Turpin, "Les nouvelle conditions de l'expulsion des refugies", *Revue française de droit administratif*, vol. 2, No. 2, March-April 1986, p. 141.

entering the territory is important for distinguishing non-admission from expulsion in the broad sense since, in the Special Rapporteur's view, aliens who have crossed the immigration control barriers and are in the territory of the receiving State, outside the special zones where candidates for admission are detained, may be subject only to expulsion and no longer to non-admission.

173. Refusal of admission may consist in an express decision by the competent authorities of the State to which the request for admission is made or in the refusal to grant a visa, a necessary but not sufficient condition for access to the territory of most States. In general, diplomatic and consular authorities have the discretionary power to refuse or grant a visa to an alien who requests it.[226] The decision to refuse entry to the alien may be executed ex officio by the administration,[227] in other words without the need for a court decision. This lies outside the scope of expulsion even in the broad sense. Non-admission therefore does not fall within the scope of the definition of expulsion for the purposes of this topic.

(g) Transfer, surrender, rendition

174. Like expulsion, transfer describes the forced movement of individuals from one State to another, in other words, beyond its frontier. It differs, however, not only from exclusion, which is a sovereign decision made by the expelling State on the basis of domestic legal procedures, but also from extradition, which, as was seen earlier, is a special institution combining rules of domestic law with the rules of international treaty or customary law. Technically speaking, transfer consists in making an individual available to the jurisdiction of a foreign State or an international jurisdiction that requests it, so that the individual may appear in person or give evidence or assist in an investigation. In principle, such a procedure requires an international treaty that obliges all the States parties to carry out such a transfer. According to the model treaty on mutual assistance in criminal matters adopted by the General Assembly of the United Nations in 1990, a person in custody may be transferred to the requesting State, subject to his or her consent and if the requested State agrees and its law so permits.[228]

175. In recent years the practice of transfer has developed as a result of the setting up of international criminal courts. In accordance with the international legal instruments relating to these courts, a State may transfer an individual to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 and the International

[226] See, for example, Florence Chaltiel, "Le juge administratif, juge de l'immigration", *Revue du droit public et de la science politique en France et à l'étranger*, No. 1-200, p. 168; Danièle Lochak, "L'entrée et le séjour des étrangers en France: une législation sous influence", *L'actualité juridique droit administratif*, 20 October 1969, p. 592; see the ruling of the French Council of State handed down on 28 February 1986 in *Ngako Jouga. Rec.*, p. 49, obs. B. Pacteau, (*Dalloz*, 1986).

[227] See French Constitutional Council, Decision no° 93-325 DC of 13 August 1993, para. 5, note Bruno Genevois, *Revue française de droit administratif*, vol. 9, No. 5, Sept.-Oct. 1993, p. 888.

[228] General Assembly resolution 45/117 of 14 December 1990, article 13, para. 1.

Criminal Court.[229] Pursuant to the Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia,[230] the Tribunal may request the transfer of a suspect (rule 40 bis) or a witness (rule 90 bis).[231] The statute of the International Court of Justice uses the term "surrender" (*remise*) when referring to the transfer of an individual by a State to the Court.[232] It should be noted that in the draft statute for an international criminal court, adopted by the International Law Commission in 1994, the term "transfer" is used to cover all cases where suspects are made available to the court in order to be tried.[233]

176. There have been certain abuses in the practice of transfer. There have been cases of "extrajudicial transfer" of individuals arrested in a foreign country and then taken to the United States to answer criminal charges.[234] Such abuses have increased with the struggle against international terrorism, and have taken the form of what has been called "extraordinary transfer" or "extraordinary rendition", a variant of — albeit different from — "extrajudicial transfer". In both cases, United States courts have tended to overlook the circumstances of arrest. Nevertheless, when they arrive in the United States, suspects in cases of "traditional" — so to speak — extrajudicial transfer benefit from normal due process for criminal cases, whereas in cases of "extraordinary transfer" no rules apply and the rule of law is totally absent: usually suspected of terrorism, the detained individual is held incommunicado and has no rights.[235] The United States Supreme Court recently

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[229] For example, the transfer by Serbia and Montenegro of Slobodan Milosevic, former President of the Federal Socialist Republic of Yugoslavia, to the International Tribunal for the former Yugoslavia; the transfer by Cameroon of Colonel Bagasora to the International Criminal Tribunal for Rwanda; the transfer by the Democratic Republic of the Congo (DRC) of a Congolese warlord from the Ituri region to the International Criminal Court in 2006; the transfer by Nigeria in 2006 of Charles Taylor, former president of the Republic of Liberia, to the Special Court for Sierra Leone in The Hague.

[230] See IT/32/Rev.38.

[231] A detained witness shall be transferred in accordance with the order of the International Tribunal, conditional on his or her return within the period decided by the Tribunal (rule 90 bis A). In the case of a suspect, on the other hand, the total period of detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or be delivered to the authorities of the requested State (rule 40 bis D).

[232] Article 59 of the Rome Statute of the International Criminal Court of 17 July 1998.

[233] See *Yearbook ... 1994*, vol. II, Part Two, pp. 26 ff.

[234] For example, the case of Manuel Noriega, the former Head of State of Panama, abducted in his country and transferred to the United States to answer primarily drug trafficking charges.

[235] On this distinction between "extrajudicial transfer" and "extraordinary transfer" or "extraordinary rendition", read the article "Torture, American Style" by Bob Herbert in *The New York Times*, of 11 February 2005, reproduced in French under the title "Quand l'Amérique sous-traite la torture" in *Jeune Afrique l'Intelligent*, No. 2305 of 13 to 19 March 2005, p. 28, and the initial findings of the report drafted at the request of the European Union on the complicity of some European countries in this type of transfer (or rendition) practised by the United States via Europe since the second war between the coalition and Iraq in 2003. It should be highlighted that the same reasoning led the United States authorities to surrender to the Syrian authorities Maher Arar, a 34-year-old Canadian national of Syrian origin, arrested at J. F. Kennedy airport, New York, in September 2002.

called for a return to legality with regard to the individuals detained at Guantanamo.[236]

177. Whether it is consistent with or lies outside international law, the concept of transfer does not fall within the scope of expulsion in the meaning of the present topic: on the one hand, because its legal basis lies totally within the international legal order — unlike expulsion; on the other hand, because transfer concerns the nationals of the transferring State as well as aliens residing in its territory, whereas expulsion concerns only aliens, it being a well-established principle that no State may expel its own nationals.

2. Territory, frontier and expulsion

178. Expulsion entails the idea of the forced displacement of an individual outside the known limits of one place to another place. When considered with regard to States, it refers to the displacement of an individual under constraint beyond the territorial frontier of the expelling State to a State of destination. We have now to determine what we mean by a State's territory and its frontier in the context of the present topic.

(a) Territory

179. The territory of a State may be described as being "the land surface and its vertical extensions, which are the subsoil, on the one hand, and the airspace over the subjacent surface, on the other".[237] This representation of territory combines, as can be seen, the notion of territory *stricto sensu*, derived from the word "terra", and that of space, referring to airspace. Although it is qualified as "comprehensive", this definition does not cover all the spaces that may be included in the notion of territory. Territory also contains other maritime spaces under a State's sovereignty, such as its internal waters (including estuaries and small bays) and territorial sea, in addition to its superjacent airspace.[238]

180. According to a definition that is compatible with all aspects of a State's territorial sovereignty and which, in the Special Rapporteur's view, is relevant to the present topic, territory is understood to be the space where "the State exercises all of the powers deriving from sovereignty";[239] it therefore excludes spaces where it exercises only sovereign rights or functional jurisdiction, such as the continental shelf and the contiguous zone, fishing zone and exclusive economic zone.

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[236] A decision of the United States Supreme Court of 29 June 2006 declared unconstitutional the military courts set up to try the Guantanamo prisoners and recommended that President George W. Bush work with Congress to find a solution to replace them. In a memorandum dated 7 July 2006, the Deputy Secretary of Defense, Mr. Gordon England, said that the Supreme Court had established that article 3, common to all four 1949 Geneva Conventions, "applies [...] to the conflict with Al Qaida" and by extension to the Guantanamo detainees (see *Le Monde*, 13 July 2006, p. 4).

[237] See Charles Rousseau, *Droit international, vol. II, Les sujets* (Paris, Sirey, 1974), pp. 36-37.

[238] See, on this point, the Judgment of the International Court of Justice of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, Merits, *I.C.J. Reports 1986*, p. 111.

[239] Patrick Dailler and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7th ed. (Paris, Librairie générale de droit et de jurisprudence, 2002), p. 44, para. 270.

181. International law does not require that the territory of a State belong to one single holder, or even that its various land or island components be situated in the same geographic area in the vicinity of the main part of the State. Historically, enclaves and territorial corridors have been known to exist and even now, several former colonial and non-colonial Powers possess island or continental territorial dependencies in several regions of the world.

182. While the delimitation of State territory is not legally required in order for a State to exist, there is no doubt that defining a territory means defining its frontiers, as the International Court of Justice pointed out in the *Territorial Dispute* case (*Libyan Arab Jamahiriya v. Chad*).[240]

(b) Frontier

183. The term "frontier" has been defined empirically as "a line determining where the territories of two neighbouring States respectively begin and end".[241] But a frontier does not separate only neighbouring States; it also separates a State from all other States, neighbouring or distant. In this regard, the frontier is not only a physical line separating territorial areas. It is an international limit of State sovereignty and jurisdiction.[242] As the arbitral tribunal charged with determining the maritime boundary between Guinea-Bissau and Senegal indicated, an international boundary is the line formed by a series of points delineating the furthest limits within which the legal order of a State is applicable,[243] be it a land or maritime border.

184. The legal regime of the frontier derives as much from the rules of international law as from those of the domestic law of each State regarding entry into and departure from the territory. However, this legal regime can also be established by mutual agreement of the States in a constructed legal space. Thus, for example, the European Union member States parties to the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at the Common Borders and the 19 June 1990 Convention applying the Schengen Agreement, decided gradually to abolish checks at their common borders;[244] however, its provisions were not, according to the French Constitutional Council, "comparable to the abolition or modification of the frontiers that legally delimit the territorial jurisdiction of the State".[245]

185. After careful consideration, perhaps a combination of the frontier line and the concept of frontier zone, at times criticized,[246] to be sure, but reinterpreted and

[240] See Judgment of 13 February 1994, *I.C.J. Reports 1994*, p. 20.

[241] Jules Basdevant, *Dictionnaire de la terminologie du droit internationale* (Paris, Sirey, 1960).

[242] Black's Law Dictionary defines frontier as "a line marking the limit of the territorial jurisdiction of a state or other entity having an international status".

[243] Judgment of 31 July 1989 published in the *Revue générale de droit international public*, 1990, p. 253. See also the arbitral award of 13 October 1995 in the case of *La Laguna del Desierto*, para. 59, and the Judgment of 12 July 2005 of the International Court of Justice in the *Frontier Dispute* case (*Benin v. Niger*), para. 124 (available at the web address www.icj-cij.org).

[244] See Patrick Dailler and Alain Pellet, *Droit international public (Nguyen Quoc Dihn)*, 7th ed. (Paris, Librairie générale de droit et de jurisprudence, 2002), p. 417, para. 298.

[245] Constitutional Council, Decision of 25 July 1991, No. 91-294 DC.

[246] See the arbitral award of 16 November 1957 in the case concerning *Lake Lanoux*, *Reports of International Arbitral Awards*, vol. II, p. 307, and compare the arbitral award of 19 February 1968 in the case concerning the *Indo-Pakistan Western Boundary (Rann of Kutch)*, *Reports of International Arbitral Awards*, vol. XVII.

adapted in the context of this topic, corresponds better to the concept of frontier in relation to admission or non-admission and expulsion of aliens. The frontier understood as a territorial limit outside of which the expelling State wishes to place the alien is a multi-functional zone comprising an ensemble of carefully delineated areas with varying legal status. The issue comes down to official points of entry and departure. Whereas illegal immigration is the clandestine breach by an alien of the frontier at any possible point, expulsion generally only happens through official points of entry and departure, including ports, airports and land frontier posts. These official points of entry and departure include checkpoints and, in international airports and certain ports, special areas for the detention of aliens denied entry or in the process of expulsion, and international areas where aliens are considered still outside the territory. The expelled alien held in a special area at an airport, port or land frontier post while waiting to be placed on board a plane, ship or vehicle is already expelled from the legal standpoint, which does not alter the obligation to respect the dignity and the fundamental rights attached to the alien as a human being.

186. In this regard, the frontier cannot be treated as a line, but as a zone with limits fixed by State regulations according to the areas that are established there. It is a zone of limits. The crossing of the line by the expelled person takes but a moment, though it is certainly critical to the process of expulsion. Therefore one could say that, for the purposes of this topic, the frontier of a State comprises the zone at the limits of the territory of a State in which a national of another State no longer benefits from the status of resident alien and beyond which the national expulsion procedure is completed.

3. Constituent elements of expulsion

187. Expulsion is an act of the expelling State. Can it also be the conduct of that State? It is, in any case, coercive in nature.

(a) Act or conduct

188. In the domestic law of most States, expulsion is a unilateral act by the State, taking the form of a unilateral administrative act, since it is a decision of administrative authorities.[247] It is a formal act that may be contested before the courts of the expelling State, since expulsion is a procedural process, each stage of which can be contested.

189. Does expulsion therefore presuppose a formal measure in every case? As noted by Mr. Gaja, it seems that one should also consider that expulsion occurs even in the absence of a formal legal act, as soon as a State creates the conditions making life impossible for the person in question. In practice, there seems to be little difference between a formal measure of expulsion and State conduct designed to force an individual from its territory, since in both cases the person in question must leave. "It seems reasonable to encompass both cases within the concept of expulsion".[248]

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[247] In the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* pending before the International Court of Justice, expulsion was pronounced by a decision of the Prime Minister at the time.

[248] G. Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 290.

190. In this regard, the author draws support for his argument from two awards by the Iran-United States Claims Tribunal. In *International Technical Products Corporation, et al. v. the Government of the Islamic Republic of Iran*, the Tribunal recognized:

> "... in principle, the possibility that the constituent elements of expulsion ('removal, either 'voluntarily', under threat of forcible removal or forcibly') can be fulfilled in exceptional cases even where the alien leaves the country without being directly and immediately forced or officially ordered to do so. Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover are attributable to the State in accordance with principles of state responsibility".[249]

191. In the case of *Jack Rankin v. the Islamic Republic of Iran*, the Tribunal noted that upon his return to Iran in February 1979, the Ayatollah Khomeini had called for the departure of all aliens and, consequently, his Government had implemented a policy that had forced numerous aliens to leave Iran. The Tribunal added:

> "However, it does not automatically follow that all U.S. nationals who departed from Iran ... after the implementation of this policy were wrongfully expelled. It is necessary to examine the circumstances of each departure and to identify the general and specific acts relied on and evidenced to determine how they affected or motivated at that time the individual who now is alleging expulsion and whether such acts are attributable to Iran".[250]

192. Therefore, when a formal act of expulsion has been taken by a State, it is necessary to establish, on the basis of the examination of facts or of the circumstances of the departure of the person in question from the host State, if the conduct having brought about this departure is attributable to the State.[251] Expulsion will therefore be understood within the context of this topic as an act or conduct of a State that compels an alien to leave its territory.

(b) Constraint

193. Expulsion is never an act or event requested by the expelled person, nor is it an act or event to which the expelled person consents. It is a formal measure or a situation of irresistible force that compels the person in question to leave the territory of the expelling State. This element of constraint is important in that it distinguishes expulsion from normal or ordinary departure of the alien from the

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[249] Award of 19 August 1985, *Iran-United States Claims Tribunal Reports* vol. 9 (1985-II), No. 10, p. 18.

[250] Award of 3 November 1987, *Iran-United States Claims Tribunal Reports* vol. 17 (1987-V), No. 135, pp. 147-148; see also award of 14 July in the case of *Alfred L. W. Short v. the Islamic Republic of Iran, Iran-United States Claims Tribunal Reports* Vol. 16 (1987-III), No. 76, pp. 85-86. The mechanism of attribution is explained by article 8 of the articles on responsibility of States for internationally wrongful acts of which the General Assembly took note in 2001 in its resolution 56/83; see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76.

[251] See G. Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3 (1999), p. 290.

territory. This is the element that arouses the attention or interest not only of the State of destination of the expelled person but also of third States with respect to the situation thus created, to the extent that the exercise of this incontestable right of a State places at issue the protection of fundamental human rights. Even before the violence perpetrated by some members of the security forces during the execution of expulsion orders, the formal measure ordering the expulsion is an injunction and hence a legal constraint, just as the conduct which forces the alien to depart is a constraint in that it is physically experienced as such.

194. We have attempted to differentiate the two concepts of "expulsion" and "alien". Now the challenge is to connect them in order to elicit their meaning and also the sense of some key concepts that will allow us to advance more firmly in the treatment of the topic. In light of the above exposition, the following article devoted to definitions can be proposed:

Article 2: Definitions

For the purposes of the draft articles:

(1) The expulsion of an alien means the act or conduct by which an expelling State compels a *ressortissant* of another State to leave its territory.

(2)

(a) An alien means a *ressortissant* of a State other than the territorial or expelling State;

(b) Expulsion means an act or conduct by which the expelling State compels an alien to leave its territory;

(c) Frontier means the zone at the limits of the territory of an expelling State in which the alien no longer enjoys resident status and beyond which the national expulsion procedure is completed;

(d) *Ressortisssant* means any person who, by any legal bond including nationality, comes under [the jurisdiction] [the personal jurisdiction] of a State;

(e) Territory means the domain in which the State exercises all the powers deriving from its sovereignty.